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Supreme Court of the United States

OCTOBER TERM 1973

No. 73-1832

ALPHONSE CIRILLO and VINCENT MURPHY,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM — 1973

NO.

ALPHONSE CIRILLO and VINCENT MURPHY,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Alphonse Cirillo and Vincent Murphy, pray that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals, Second Circuit, entered May 7, 1974 (Exhibit A *infra*) which affirmed the judgment of the United States District Court, Eastern District of New York (Honorable Orrin G. Judd), entered July 30, 1973, as to the petitioner Alphonse Cirillo and the judgment entered September 10, 1973 as to the petitioner Vincent Murphy, whereby the said petitioners were convicted as follows:

Both petitioners were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. 846; both petitioners were convicted of possession with intent to distribute one kilogram of heroin (count 1); both petitioners were convicted of distribution of the identical quantity of heroin involved in count 1 (count 2); both petitioners were convicted of attempting to distribute 1/2 kilogram of heroin (count 7).On July 30, 1973 the petitioner, Alphonse Cirillo was sentenced to 14 years, 9 months imprisonment and 10 years special parole on counts 1 and 2; 10 years imprisonment to be served consecutively to the aforementioned term, and 10 years special parole on counts 7 and 9. Cirillo was also fined the sum of $10,000 on count 1 and $10,000 on count 9. On October 12, 1973 Murphy was sentenced to concurrent terms of 10 years imprisonment and 7 years special parole and a $5,000 fine on count 9.

THE OPINION OF THE COURT BELOW:

The opinion and decision of the United States District Court, Eastern District of New York, denying a motion made by the petitioners to suppress the evidence on the grounds of illegal wire tapping, is set forth below (Appendix B, *infra*). Such opinion is not otherwise reported.

The opinion of the United States Court of Appeals is also set forth in Appendix A as aforesaid. Such opinion is not otherwise reported as yet.

JURISDICTION:

The order and judgment of the United States Court of

Appeals for the Second Circuit is dated May 7, 1974. Jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED:

(A) Were the New York State wire tap warrants or orders valid where the first of successive warrants failed to provide and direct that the authorities minimize the electronic eavesdropping to be conducted thereunder?

(B) Did the petitioners receive a fair hearing on a motion to suppress the evidence where the trial court denied the motion without affording the petitioners an evidentiary hearing as to the issue of minimization?

(C) Was and is 18 U.S.C. 2510 et. seq. or Title III of the Omnibus Crime Control and Safe Street Acts constitutional under the 1st, 4th, 5th, 9th and 14th Amendments to the Federal Constitution also bringing for review the constitutionality of the New York State statutes authorizing electronic surveillance, such statutes being found in 11A McKinney's Consolidated Laws of New York Annotated, Sections 700.05 of the Criminal Procedure Law of the State of New York?

CONSTITUTIONAL AND PRINCIPAL STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

"Searches and Seizures: The right of the people to be secure in their persons, houses, papers and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V:

". . . , nor be deprived of life, liberty or property without due process of law; . . .

AMENDMENT IX:

"The enumeration under the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT XIV, SEC. I

". . .; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

47 U.S.C. 605 (Federal Communications Act)

"Unauthorized publication of communications. — Except as authorized by Chapter 119, Title 18, U.S.C. Code (18 U.S.C. Sections 2510-2520) no person receiving, assisting or receiving transmitting or receiving and transmitting any interstate . . . communication by wire . . . shall divulge or publish the existence, contents, . . . thereof, . . ."

18 U.S.C. 2515

"Prohibition of Use as Evidence of Intercepted Wire or Oral Communications. — Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence at any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter . . ."

18 U.S.C. 2516

"Authorization for Interception of Wire or Oral Communications. —

"(2) The principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a state court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with Section 2518 of this chapter and with the applicable state statute an order authorizing, or approving the interception of wire or oral communications . . ."

18 U.S.C. 2518(5)

". . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . ." .

(8)(A)

"Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders . . ."

(10)(A)

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that — (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."

11A McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, CRIMINAL PROCEDURE LAW, SECTION 700.30:

"An eavesdropping warrant must contain: (7) A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, . . ."

STATEMENT OF THE CASE:

The origin of this case is found at a time when the New York City police, the Kings County District Attorney and Federal authorities applied on October 31, 1972 to a judge of the Supreme Court of the State of New York, Appellate Division, Second Department, for the issuance of a wire tap order or warrant, subjecting Cirillo's telephone to electronic surveillance or wire tapping. The application was based on the affidavit of the District Attorney of Kings County, City and State of New York, who relied principally on an affidavit of a police officer named Douglas LeVien, a New York City police officer. The applicants were successful and the order was granted (the order is found in Appendic C, *infra*).

After the time allotted in the order, for surveillance, the authorities succeeded in procuring successive and renewal orders from diverse state Supreme Court judges. The original order of October 31, 1972 was renewed November 29, 1972 and further renewed for the following dates: December 27, 1972, December 29, 1972, January 25, 1973, February 27, 1973, and March 29,

1973 (16-300).*

The first order or warrant of October 31, 1972 while referring to the crimes under investigation and authorizing the interception of conversations relating to narcotics, did not contain any direction to the authorities to minimize the interception (16-19). The renewal warrants contained such direction (70, 111, 147, 173, 223, 248, 273).

As a result of the interceptions, conducted under the respective orders or warrants, the petitioners were arrested March 15, 1973. At the time of the arrest a search and seizure of the heroin was had.

Prior to trial, the petitioners made a motion (Murphy joined in the motion made by Cirillo) in the trial court for the suppression of the evidence (301-339).

Cirillo by his counsel with Murphy's joinder, submitted an extensive affidavit alleging the factual basis for the granting of relief.

It was only when the motion came on to be heard that the United States Attorney first submitted affidavits in support of the opposition to the petitioners' application. The substance of the government's opposition was to the effect that while the initial warrant or order did not contain a direction to the authorities to minimize the interception, in practice minimization was conducted (340, 348, 352, 353).

No evidentiary hearing was conducted by the Court that ultimately denied the motion. As a matter of fact, the motion

*( ) This refers to the pagination of the joint appendix filed in the Court below by the petitioners.

was then and there denied in open Court, the Court adding that a written decision would be filed subsequently. And so after the denial the Court did render a written opinion or decision setting forth the grounds of the denial (Appendix B, *infra*). The Court in its decision acknowledged that the petitioners raised the issues that the first order or warrant did not provide for a direction to the authorities to minimize the interceptions.

The first warrant or order, the seminal warrant, designated Cirillo as a suspect and his telephone number, 212-631-8570, as being the suspect phone used (16, 17). To procure this warrant, the authorities submitted the affidavit of the District Attorney of Kings County, who adopted or ratified an affidavit by a police officer named LeVien who was investigating the case (35-38, 39-67). The police officer's affidavit alleged that on October 6, 1972 a reliable informant related hearsay to Cirillo and his address.

The police officer further related that the informant told him that on October 2, 1972 he met the petitioner Cirillo with a person named Inciarrano and a "John Doe Murphy". The informant characterized Inciarrano as the petitioner's "connection" and Murphy as his partner (41, 42). The day in question, namely, October 6, 1972, the informant went to Cirillo's home where he noticed a telephone described as a "country telephone" and an additional telphone in another part of the house described as a "princess telephone" (42, 43).

The informant's hearsay further related that the purpose of the meeting was the "transcribing" of about 200 kilograms of heroin (44). The "connection" was designated by the informant as a "Cuban Jew" who was mentioned by Cirillo. The reliable and confidential informant would further have it that Cirillo told him that he received large amounts of heroin from the "Cuban Jew" four (4) times a year and that the "Cuban Jew" was in

Florida. Cirillo guaranteed about 20 kilograms of heroin to Inciarrano at $25,000 a kilo (29). The informant's hearsay further continued to the effect that Cirillo told him that a shipment would occur after November 1, 1972 and that it would be received at a motel in New York (45). According to the informant he actually saw a quarter of an ounce of heroin in the premises used for "snorting". The informant also saw Cirillo use a telephone and talk about the sale of heroin over it. Murphy also used the telephone for the same purpose (45, 46).

On October 19, 1972 the informant and Inciarrano went to Cirillo's house where they discussed 200 kilograms of heroin, Cirillo telling them that the "Cuban Jew" went to Florida to arrange for a shipment (53, 54). It developed however that the informant also stated that at the time of this conversation the "Cuban Jew" was allegedly staying in Cirillo's house but that in the future he was going to Florida to arrange for the shipment (54). The informant would further have it that a call from Florida was expected by Cirillo as to the time the shipment would be made (54, 55). Cirillo was said also to have told the reliable and confidential informant that he kept 20 kilos of heroin in his garage. On October 19, 1972 the informant stated he used Cirillo's phone to discuss the sale of narcotics (56). On October 25, 1972 the informant called Inciarrano and discussed cocaine that Cirillo might be interested in. This call emanated from the office of the District Attorney of Kings County; thus, the informant asked Inciarrano as to whether he could call Cirillo and Inciarrano consented. Consequently the informant called Cirillo. That conversation was recorded by the authorities and was set forth in the police officer's affidavit (57-62). The police officer interpreted the conversation as relating to the petitioner's use of cocaine and also referring to the shipment of heroin from Florida (62-64). Parenthetically it is confusing as to why the police officer had to interpret such a conversation when

all he had to do was ask the informant.

Through the product of eavesdropping under the first warrant, which did not contain a direction to minimize, the authorities procured successive warrants (68-70, 109-111, 145-147, 170-173, 221-223, 245-248, 271-273). The authorities in seeking the successive warrants, set forth some of the intercepted conversations procured and seized under each prior warrant, in their respective affidavits submitted in support of each respective application to procure such warrants (74-88, 90-104, 116-136, 153-155, 157-163, 179-192, 195-213, 228-238, 254-264, 279-292). In investigating this case, and conducting electronic surveillance, the authorities finally on December 5, 1972 saw a person they knew as Walter Sorrenson enter a movie on a street in Brooklyn, go to a bar and thereafter leave by automobile. They followed Sorrenson and saw him enter a building at another location in Brooklyn and emerge from that building. It now developed that Walter Sorrenson was designated by the police as the "Cuban Jew". The observations as to Sorrenson further disclosed that he left the building with a woman and went to another location in Brooklyn. The authorities claimed that Sorrenson was listed with the State and Federal authorities and was also known as Benjamin Casal, having a telephone number in Florida, namely 305-864-7124. Prior to these observations of Sorrenson, the police also saw him meet Cirillo in a diner and speak to him. However, the substance of the conversation was unknown to the police (138-141).

In opposing the motion, the government submitted three affidavits verified June 11, 1973, the day before the motion came on to be heard. These were served the day the motion came on to be heard (4, 366-368). The substance of these affidavits were that the Assistant District Attorney of Kings County and the particular United States Attorney knew all about minimization

and directed the authorities to minimize the interceptions under the warrants (343). As part of the opposition a United States Agent named Dovetko submitted his affidavit describing that he was cooperating with the state authorities investigating this case, and that prior to the application for the first wire tap order or warrant the government attorney called his attention to minimization; that the agent thereafter visited the "plant" and saw the police actually minimize the surveillance (345-346).

An analysis of the minimization will be hereinafter set forth by counsel for the petitioners. At trial, a police officer named Garcia testified. He stated that he had occasion to listen to all the tapes in this case (388). He considered himself an expert on interpreting conversations electronically overheard, in regard to narcotic investigations (390). However, when asked whether he was familiar with the term "argot" in relation to narcotics he didn't know the meaning of the word "argot".

Garcia testified that there were 899 wire tap orders executed by the District Attorney's office before. He admitted that he heard conversations of Mrs. Cirillo over the subject telephone and also the conversations engaged in by Cirillo's children (390, 391). These were partial conversations (391).

Garcia further explained that while auditioning he would attach a secondary meaning to common expressions depending upon the context of which such expressions would be used (391, 392). Thus he was asked whether a conversation relating to children going to school could relate to narcotics. He couldn't recall whether Cirillo's children spoke about going to school however (392). Garcia listened for roughly 150 to 200 hours (392).Garcia admitted that this was more than the average time in regard to auditioning (392, 393).

Garcia did state that he did listen to the children when they spoke. But then he added it was only calls that he felt were important that he listened to (393).

However, because Garcia suspected the petitioner Cirillo of dealing in narcotics he placed more importance to what Cirillo said.

Thus, when asked whether he would attach a sinister meaning if he heard Cirillo talking about sending his children to school, the police officer stated that in this case he would attach such a sinister meaning (393, 396). Garcia stated that he didn't listen to the children of Cirillo when he spoke (393).

This witness further admitted that he overheard Cirillo talking over the telephone in regard to the size of clothing his children wore (397). He overheard a co-defendant's wife a Mrs. Sorrentino on the telephone on numerous occasions as well as her children (397, 398). He actually overheard Mrs. Sorrentino say over the telephone that she wore torn clothes (398). However this police officer admitted if her husband, Mr. Sorrentino, spoke about that subject, he would attribute a criminal meaning to those words (398).

In regard to Cirillo's wife, he overheard her speak twenty-five (25) times (399). In regard to Cirillo's children he overheard them talk over ten (10) times. Then Garcia admitted it was probably twenty (20) times and could have been thirty-five (35) to forty (40) times (399, 400).

In regard to Mrs. Sorrentino who was a co-defendant's wife, this police officer overheard her talk over the telephone twenty-five (25) times (399, 400).

REASON FOR GRANTING THE WRIT:

A. The first wire tap order or warrant was defective in that it failed to contain a direction to the authorities to minimize the interception to be conducted thereunder and this failure required the suppression of all products as well as derivative evidence secured thereunder.

In *Geibard v. United States*, 408 U.S. 41 (1972) it was stated on page 446 that:

> "In Title III, Congress enacted a comprehensive scheme for the regulation of wire tapping and electronic surveillance . . . Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specific serious crimes and receive prior judicial approval, an approval that may not be given except on compliance with stringent conditions . . . If a wire or oral communication is intercepted in accordance with the provision of Title III, the contents of the communication may be disclosed and used under certain circumstances . . . Except as expressly authorized in Title III, however, all interceptions or wire and oral communications are flatly prohibited . . ."

Concededly, the first order or warrant did not follow the legislative command found in 18 U.S.C. 2518 (5) that such order or warrant contain a direction to minimize. It is suggested, that to validate such an order because the authorities could refer to such limitation elsewhere, is to rationalize what Congress stated must be expressly provided for in the order. For it is further provided in 18 U.S.C. 2518(10)(A)(ii), that the evidence must be suppressed where the order authorizing interception is insufficient on its face.

The order in this case was insufficient on its face and therefore void. It could not be used at all.

In *U.S. v. Giordano,* May 13, 1974, No. 72-1057, 42 U.S. Law Week, 4642, 4649, it was stated by this Court in part that:

> ". . . The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. . . ."

In analyzing the legislative history of Title III, it was further stated by this Court that:

> ". . . but the report also states that the section provides for the suppression of evidence directly or indirectly obtained 'in violation of the chapter' and that the provision 'serves to guarantee' that the standards of the new chapter will sharply curtail the unlawful interception of oral and wire communications. . . .", at page 4649.

That minimization is a substantial issue, may be inferred by the fact that this very Court specifically noted that it was not an issue in its opinion found in *U.S. v. Kahn.* ——U.S.—— 39 L.Ed., 225, at page 234, 94 S. Ct. ——, 1974.

Statutes allowing wire tapping it is submitted must be strictly construed and kept within the controls or confines that Congress imposed.

As was stated in *Application of the United States for Relief*, 427 F.2d 639 (Cir.—9th, 1970) at page 643:

". . . The government's entire case rests upon what it believes may be implied from the act, and upon other general principles summarized above."

"Title III of the act is rather extensive, containing ten sections, some quite lengthy. It purports to constitute a comprehensive legislative treatment of the entire problem of wire tapping and electronic surveillance, complete with the extensive introductory congressional findings. The provisions contained in Title III state, in precise terms, what wire tapping and electronic surveillance is prohibited and what is permissible. As to the latter, meticulous provision is made with respect to the necessity and manner of obtaining prior or subsequent judicial approval, the use which may be made of intercepted information, the way in which aggrieved persons may test the validity of the interception, and the collection and transmission to congress each year of information concerning such activity."

"Nor do we find any provisions in the Act or in the history of its enactment which points in the direction of applied authority. Quite the contrary, consideration of the constitutional significance of the legislation, the relevant provisions of the Act, and the legislative history tend to the opposite direction."

". . . If the Act is to survive a constitutional challenge, a question which we do not here reach, it can only do so by giving the Act as limited a construction as is warranted by

the language. The construction which the government would give Title III, however, whereby an important judicial power is not expressly provided for, would be implied, manifest not unlimited but an expansive reading of the act."

On page 644 it was further stated that:

". . . the congressional findings set forth in Section 801 of the Act, at the head of Title III, intent to define with utmost particularity the circumstances and conditions which an interception may be effectuated. This intent is also manifested in the Senate Report referred to above . . ."

"Congress thus acted advisedly when it formulated and enacted the legislation incorporated in Title III. It was fully aware of the physical problems involved in making investigative wire taps, but it was nevertheless determined to enact a carefully circumscribed act . . ."

In *U.S. v. Scott*, 331 F. Supp. 233 (D.C., Dist. of Col., 1971) it was stated on page 246 that:

"Contrary to the contention of the defendants the statute does not require the Order to state how the agents are to minimize receipt of communications 'not otherwise subject to interception'; nor does the Fourth Amendment prescribe such a requirement. It is sufficient for the Order to state the requirement and direct the officer to carry out the mandate of that order. Whether the surveilling agents in this case actually did conduct the intercept 'in such a way as to minimize the interception of communications that are (not) otherwise subject to interception' is a separate question which will be discussed in another

section of this memorandum."

"A basic requirement of 18 U.S.C. 2518 is that a neutral detached authority be interposed between the police department . . . The order of January 24, 1970 in its final paragraph allows for continued judicial supervision and control by that 'neutral and detached authority' during the execution of the order . . ."

In *U.S. v. Scott, supra,* at page 247 there was an acknowledgement by the Government as phrased by the Court. This was as follows:

"As the government has contended 'Title III . . .' was an attempt among other things to structure a limited system of wire surveillance and electronic eavesdropping . . . One of the limiting provisions of the statute is found in U.S.C. 2518(5) . . ."

"This mandate was clearly set forth in the . . . order. It was the opinion of this court that these limiting provisions satisfied the requirements of 4(c) and (5) and thus made the order valid."

Consequently this was a clear holding that the converse, namely that a warrant which does not contain a direction for minimization is void.

Because of the sensitivity involved in wire tapping, and the extreme intrusiveness, all without prior notice of purpose and authority, it would seem that the usual standards applying to search warrants are inapplicable to eavesdrop warrants. It is submitted that the subject matter of the search and seizure

determined the respective standards applicable to the discreet searches and seizures. In other words, the more intrusive the search the more is required of the authorities. As was stated in *Roadin v. Kentucky*, ——U.S.——, 37 L.Ed., 2d 757 (1973) at page 763:

> ". . . the Fourth Amendment proscription against 'unreasonable seizures', applicable to the states . . ., must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material . . ."

Then on page 764 of 37 L. Ed. 2d it was stated that:

> ". . . seizing a film, then, being exhibited to the general public, presents essentially the same restraints on expression as to the seizure of all books in a book store. Such precipitious action by a police officer, *without the authority of a constitutionally sufficient warrant*, is plainly a form of prior restraint and is in those circumstances unreasonable. . . ." (Emphasis supplied).

Therefore, the first wire tap order in this case was and is void because it was not 'constitutionally sufficient'.

Since the warrant was, it is submitted, completely void on its face, all the wire tap warrants in this case which sprang from it were void because the exclusionary rule infected such successive warrants. In other words the investigation by means of electronic surveillance in this case was void abinitio.

As was held in *U.S. v. Cox*, 462 F.2d 1293 (Cir.-8th, 1972) 1300:

"The touchstone for deciding the minimization issue is that it rests on a statutory command and therefore turns on the intent of Congress in issuing that directive. The constitutional question of the discreteness, required of a wire tap is a separate question . . . Also the fact that the wire tap warrant included a command to 'minimize' is directly attributable to the statutory requirement that the order so specify . . ."

See *U.S. v. Tortorello*, 480 F. 2d 764 (Cir. 2d 1973), Cert. Denied, 414 U.S. 866 (1973), where this Court specifically noticed that the warrants under consideration included a direction in compliance with Section 2518(5) of 18 U.S.C., the statutory mandate for a specific direction in the warrant as to minimization.

See also *U.S. v. Focarile*, 340 F. Supp. 1033 (D.C., Dist. Md., 1972) 1044, 1045, 1046, 1047, Sub nom *U.S. v. Giordano*, 469 F.2d 522, *U.S. v. Giordano, supra.* See also *State v. Siegal*, 13 M.D. App. 444, 285 A. 2d 671 (Court of Special Appeals, Maryland, 1971), at pages 633, 634 where it was stated that:

"We think it is also mandatory that an interception order 'contain a provision that the authorization to intercept shall be executed as soon as practicable,' and a provision that the interception 'shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interceptions' under the Act. The order . . . contains neither of these provisions . . . Even if this statement by the issuing judge is deemed in compliance with the statutory mandate, the actions of the required provision in the order of 6 October tainted the order of 13 October and 5 November because they each

fell on the first order . . . The invalidity of the order of 6 October would render invalid the two renewal orders.

Congress in enacting legislation authorizing electronic surveillance also granted authority to the states to do so, 18 U.S.C. 2516(2). However, while the state statutory system may be more restrictive than the federal, the State Statutes cannot be less restrictive than the federal. See Section 605 of the Federal Communications Act. See, in this respect, *State of New Jersey v. Sidoti*, 116 N.J. *supra*, 70, 280 A. 2d 864, at page 868 where it was stated in part that:

". . . the Omnibus Act imposed minimum standards upon states with respect to the use of electronic surveillance . . . It was explained by the Senate Judiciary Committee that under the Federal Law 'states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.' S. Rep. No. 1097, 90th Cong. 2nd Sess. 98 (1968), U.S. Code Cong. & Admin. News p. 2187 . . ."

Section 700.30 of the Criminal Procedure Law of the State of New York, 11A McKinney's Consolidated Laws of New York, mandates that the warrant or order contain the provisions as to minimization.

New York courts have construed the state statute favorably to the petitioners' position.

In *People v. Pieri*, 69 Misc. 2d 1085, 332 N.Y.S. 2d 786, 789 that:

". . . In the opinion of this Court, the eavesdropping

warrant was invalid because of its failure to include the provisions regarding termination required by Section 700.30 subdivision (7) . . ."

In *People v. Holder*, 69 Misc. 2d 863, 331 N.Y.S. 2d 557, the defendants claimed that the wire tap order was void because it failed to contain a direction that the authorities in executing such order, minimize the interception of communications. On page 566 of 331 N.Y.S. 2d it was held that:

"For the reasons hereinafter set forth, the Court concludes that the eavesdropping warrant under discussion is invalid and violative of (the then state statute governing the requirement as to minimization) . . ."

In *Holder* the Court in setting forth the reasons for its holding, stated on page 568 of 331 N.Y.S. 2d:

"The Court concludes that this provision, which the New York statute states 'must' be contained in the order is not merely directory but is mandatory . . ."

In *People v. Kennedy*, 75 Misc. 2d 10, 347 N.Y.S. 2d, 327, the authorities procured successive wire tap orders. The warrant under consideration in that case, failed to contain the direction to minimize. It was stated on page 332 of 347 N.Y.S. 2d that:

"The case before this Court differs from Focarile in that the order in Focarile contained a provision for minimization. The order here does not. Further, this Court is unwilling to subscribe to the principle that the

affidavit shows probable cause to believe that a conspiracy is in progress, minimization should be ignored."

It was further stated on page 333 of 347 N.Y.S. 2d that:

"At the outset here the wire tap order did not comply with either the requirements of the New York State statute or the Federal statute in that it failed to provide for minimization. No evidence was presented to this Court that this failure was the result of inadvertance. Such a failure must result in a suppression of the evidence since this requirement is essential to the protection of the individual in avoiding the general warrant nature of an eavesdropping warrant. The statute was written to avoid the general warrant prescription in Berger v. New York, 388 U.S. 41 . . ."

"The New York statute which was written in accordance with the opinion clearly sets forth that the warrant 'must' contain . . . We disagree with the People's contention that the word 'must' is not a mandate."

The Court below in *U.S. v. Tortorello*, 480 F.2d 764 (1973), Cert. Denied 414 U.S. 866 (1973), stated at page 783:

"All the Todd Associates orders included a provision in compliance with this section. (18 U.S.C. 2518(5)). The question raised here is whether the executing officers took reasonable measures to minimize the interception of the irrelevant communications."

It is therefore submitted that that case is not relevant to the concrete issue presented in this case.

In a contrasting situation, found in *U.S. v. Manfredi,* cited on page 3307 of the Court's decision and opinion below, 488 F.2d 588, 598 (Cir. 2d-1973), it was held that while the warrants under consideration, neither the original or renewal warrant orders, however, contained any directive to this effect. This was not fatal because the affidavits submitted by the authorities to procure the warrants contained "an agreement" to minimize. Then the Court added:

> ". . . In this case we feel free to analogize from U.S. v.Tortorello, 480 F.2d at 781, which, while it apparently did not consider the matter as controlled by state law, held that a New York State judge's authorization order was sufficient to establish probable cause on the basis of the facts alleged in the affidavits. We feel it proper to read both the orders themselves and the minimization language of the supporting affidavits in a 'common sense and realistic fashion' . . ."

It is respectfully submitted that "agreements" by the officials as to what they will do, is not a substitute for a legislative direction that a warrant before it can be executed and indeed even granted by a judge, must contain the directive to minimize. It is not the authorities who seek the warrant that decide the ex parte application but a judge.

Similarly, a deficient state warrant was validated in *U.S. v. Rizzo,* 492 F.2d 443 (Cir.-2d 1974), cited in the opinion below at page 3309. On page 446 the Court below stated:

> "A related claim is that the warrants were invalid on their face because it did not explicitly call for minimization. Such a failure, however, we have stated in U.S. v.

> Manfredi, 488 F.2d 588 . . . at 590, 597-599, is not necessarily fatal . . . Here each affidavit stated that the interception would be 'executed in such a manner as to minimize the possibility of intercepting privileged or non-pertinent conversations.' Moreover, the warrants themselves contain language that nothing shall be construed as authorizing overhearing or interception of any communication 'which appears privileged or unrelated to the aforementioned crimes.' In light of such language the warrant fulfills the requirements of New York law . . ." .

Thus, the holding of Manfredi, supports a holding in a later case involving a New York State warrant that the "agreement" on the part of the police or the District Attorney to minimize, satisfies the requirement that the order itself contain a direction to the authorities to minimize.

The order under consideration in this application found on pages 16-19-34 of the appendix submitted in the Court below. It recites that there was probable cause that the communications concerning the particular crime would be obtained by the interception of messages. It also stated that there was probable cause to believe that the subject instruments would be used in connection with the commission of drug offenses. Then the warrant or order ordered that the authorities could intercept and described the methods of interception. In so doing the state court stated that the authorities were to so eavesdrop over the telephone instrument in regard to the commission of the narcotic offenses.

It is respectfully submitted that the language of the order under consideration nowhere directed the authorities to minimize. The order was merely a recital of what the Court

found to be probable cause in regard to the telephone instruments that were allegedly used in the commission of narcotic offenses. There wasn't even a direction to the authorities that privilege communications were not to be intercepted. Nor was there any claim on the part of the government that there was "any agreement" on the part of the authorities that they would in fact minimize.

The Court below relied on a solitary New York holding involving this issue and reported in *People v. Solomon*, 74 Misc. 2d 926, 346 N.Y.S. 2d 938 (Supreme Court, Kings County, 1973). The rationale of the state court in that case was primarily based on the holdings in *U.S. v. Tortorello, supra*, 480 F.2d 764 and *U.S. v. Poeta*, 455 F.2d 117 (Cir. 2d, 1972;.

As a matter of fact, the holding of the Court below adopted the reasoning in *People v. Solomon*. Consequently, *People v. Solomon* absorbed the holdings of the 2nd Circuit, and the 2nd Circuit absorbed the holdings of the State court.

Apparently, adopting the reasoning in *People v. Solomon*, the Court below held that the requirement as to the direction to minimize in the warrant was at most "talismanic". However, in view of the fact that Congress specifically stated that suppression would follow where the order was insufficient on its face can hardly be called a platitude or a "talisman".

Congress had the full jurisdiction to legislate in this field. Despite the fact that the exclusionary rule may have been fashioned by the Courts rather than by the legislature, nevertheless Congress also had the full power to legislate in this field, and Congress did by enacting a simply worded rule for excluding evidence illegally procured from wire tapping and electronic

surveillance. It is submitted, this was fully recognized in *U.S. v. Giordano, supra.* See also *Weiss v. U.S.*, 308 U.S. 321, 1939.

The holding in that case was that Section 605 as it then existed, of the Federal Communications Act, was so inclusive and complete that the ban on illegal wire tapping extended not only to telephone calls that were interstate but also intrastate.

Consequently, the issue is not what the Courts have done in regard to technical oversights in procuring conventional search warrants, but what Congress has decided.

The holding in Solomon in regard to the requirement of the minimization direction, does not seem to have been followed in other cases in New York. However, that same case later reported in 75 Misc. 2d 847, 348 N.Y.S. 2d, 673 dealt with the question as to whether the authorities in executing the warrant minimized the interception. The defendants contended that the authorities failed to minimize certain conversations and that therefore all the products of the eavesdropping should be suppressed. Instead, the Court in Solomon held to the contrary stating on page 648 of 348 N.Y.S. 2d that:

> "It is the conclusion of this Court that the failure to minimize the interception of the telephonic communications does not require total suppression of all intercepted conversations. All intercepted conversations which are material and relevant to the approximately 130 which have been the subject of this hearing are admissible. Those conversations which are irrelevant and not-pertinent are suppressed. This ruling shall apply to all intercepted conversations to be offered into evidence on the trial."

Thus it can be seen that failure to include the minimization provision is excusable. Then when the authorities actually do not minimize the court performs surgery and segregates the excessive eavesdropping from the original scope of the investigation. One defect leads to another.

As was stated in *Boyd v. U.S.*, 116 U.S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

The twin holdings in *Solomon*, lead to consideration of 18 U.S.C. 2518(10)(a) which provide:

> "(iii) the interception was not made in conformity with the order of authorization or approval."

Thus Congress clearly provided for suppression in regard to the execution of the warrant. But according to the cases cited by the Court below, (ii) of that Section is held to be talismanic. The State Court then relaxes the strict requirements of (iii) of that Section.

Nor is *U.S. v. Ventresca*, 380 U.S. 102 (1965) cited by the Court below in point. That case dealt with discrepant affidavits the authorities submitted to procure the conventional search warrant. It was held that the affidavits were sufficient despite certain errors contained therein. The Court explained that due to the necessities entailed in procuring search warrants affidavits would be considered in a realistic and non-technical manner

thereby encouraging the authorities to procure search warrants. However, in this case, it cannot be said that a judge's order was prepared hastily and must be considered in a "common-sense" fashion. In a "common-sense" manner and viewed realistically, Congress and the New York State legislation drew the order and warrant leaving the issue of probable cause and the other requirements for the objective consideration by a judge. But it is the warrant issuing judge who grants relief and the relief authorizing electronic surveillance, must be confined to the attendant conditions in the case which include an express direction to minimize. See also 41 U.S.C. 605 providing that there be no wire tapping except as authorized by Congress. The order, because it omitted this vital direction, was void and the authorities actually wire tapped without an order.

Additionally, courts which are more proximate to the numerous problems arising from searches and seizures have become somewhat sensitive to discrepancies in the affidavits underlying the warrants. See *U.S. v. Thomas,* 489 F.2d 664 (Cir.-5th, 1973), where it was held that if the police officer makes a material misrepresentation in an affidavit submitted to procure a search warrant, or the misrepresentation is intentional, the warrant will be deemed void. See page 668 of that opinion. In other words, it was held that the purposes of the exclusionary rule, have to be referred to in determining misrepresentations and factual deficiencies in applications for search warrants.

More so, it is urged, where the legislature has enacted a rule of suppression as in the case of electronic surveillance.

The Court below buttressed its holding that discrepancies will not vitiate a successful search and seizure relied on the holding

of this Court in Smith v. United States, 360 U.S. 1, (1959). That case dealt with the propriety of prosecuting a serious crime by way of a prosecutor's information rather than an indictment which the defendants in that case waived. In holding that the waiver was ineffectual, this Court stated on page 9 that while convictions are not to be reversed because of "technical deficiencies which did not prejudice the accused", nevertheless held that:

> ". . . but the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules. . . ."

In this case the seriousness of the charges and the consequential terms of imprisonment, certainly demand strict compliance by the prosecution with the legislative enactment in question.

As held in *Sgro v. United states*, 287 U.S. 206, 210, search warrants are "drastic".

Nor is the holding of the New York State Court of Appeals, *People v. Glen*, 20 N.Y. 2d 252, Cert. Denied sub nom *Baker v. New York*, 409 U.S. 849 (1972) supporting authority for the decision below, see pages 3308-3309 of the slip opinion, appendix A herein. That case dealt with the propriety of a state court issuing the search warrant to seize property that may not have been in existence or at the locale subject to the warrant at the time of the issuance of the search warrant. The Court of Appeals of the State of New York held that the warrant could only be executed within a ten-day limitation; that the property to be seized was seized within the limitations.

It was further held in that opinion that technical defects of a warrant does not undo a search. However, the full holding in that respect found on pages 261 and 262 of the opinion states:

> "A subordinate issue merely alluded to by the parties is whether the possibility that the warrants by their terms could have been executed prematurely . . . renders the warrants invalid on their face. Certainly, the better practice would have been for the issuing judge to require that the search have been reasonably contemporaneous with the delivery of the package of suitcase. Nevertheless, the fact that the warrant would on its face authorize an improper search does not undo it for all purposes. The defect is a technical one and may be disregarded since the warrants were executed at the only time practicable under the facts as set forth in the affidavits, and within the ten days provided by statute and directed by the warrant on its face. Thus, that only a technical irregularity is involved is suggested by cases holding that the fact that a warrant improperly authorized a night time search did not make illegal a day time search (People v. Varney, 32 A.D. 2d 181, . . .)".

However, the search in that case was a limited one and the warrant served a statutory purpose of being executed within a ten day limitation provided by the legislature for such execution.

In this case, the failure to direct minimization related to an order or warrant that allowed eavesdropping unannounced, secret and pervasive, for a period in excess of ten days. Noteworthy, is the fact that the subject telephonic instruments were located in a domicile or a residence.

Again *People v. Varney*, 32 A.D. 2d 181, 301 N.Y.S. 2d 330 (Supreme Court, App. Div. 2nd Dept. 1969), cited in the slip opinion of the Court below at page 339 it cannot be support for the position of the Court below. In that case a search warrant granted by a New York State Court, was deemed to be in violation of the State statutes requiring probable cause justifying a night time search. The search pursuant to the warrant was actually conducted in the day time. The Court held that the warrant may have been technically deficient but that the search itself was valid.

Again, that case dealt with a search warrant that could only be executed once, and was not as pervasive in its execution as wire tapping is. Furthermore, the warrant was facially correct.

However, it is submitted, that while these cases may be looked at atomistically, and thereby having limited holdings, the aggregate of these cases constitute inroads into the fundamental right of privacy, and the warrant requirements of the 4th Amendment to the Federal Constitution. Thus, the reasoning adopted by some of the courts is that a search warrant may be technically deficient, but the search is thereby valid. Then that case serves as a holding for another case validating a search and seizure, where there are other "technical" deficiencies.

It is respectfully submitted that this Court's recent holding in *Giordano* invalidates the approach to searches and seizures that the Court below adopted.

Electronic surveillance deals with utterances, talk, speech and communication. The requirement that a warrant direct minimization, would seem to be in keeping with the 4th Amendment demand that if privacy is to be punctured, the

intrusion be limited. But since communication is involved, the 1st Amendment's freedom relating to speech also is a value to be considered. The congressional direction as to minimization is a furtherance of a 1st Amendment interest. Directives and regulations are necessary when speech is involved. Whatever government interest lies in impinging on speech, there must be narrow regulations. Consequently, these regulations are not mere talismans or platitudes. See *Procunier etc., v. Martinez.* U.S. Supreme Court, April 29, 1974, No. 72-1465, 42 U.S. Law Week, 4206, 4611, 4612.

See also VIII Suffolk University Law Review 60 (1973)

"Notes Minimization: In Search of Standards:"

In pages 78 and 79 thereof, in considering the rule as to suppression where this is a facially deficient wire tap order, it is stated in part as follows:

> ". . . Such a defect could be, for example, an insufficient degree of particularity. As previously noted, this would preclude effective 'minimization' by the monitoring office because of the lack of effective guidelines as to what may be lawfully intercepted. Such a surveillance would constitute, in effect a 'general search' and therefore, being unlawful abonitio would require suppression of all interceptions made pursuant to the order."

In *U.S. v. Kahn.* ——U.S.——, 39 L. Ed. 2d 225 (1974), the opinion of the Court held that anyone's voice over the tapped telephone is subject to seizure and interception. That the order or warrant need not name the subjects. Since this is not the law.

it is suggested that the order for authorization be precise and be promulgated in exact conformity to the enabling legislation of Congress and of this case the State legislature.

B. The Court below should have directed that an evidentiary hearing be had in the trial court to determine whether the authorities minimized properly:

The Trial Court made the decision that the authorities minimize. But the finding was made upon a consideration of the affidavits submitted by the prosecution. There was no evidentiary hearing conducted.

Initially, petitioners' counsel made an application to suppress the evidence by the serving and filing of a Notice of Motion and an affidavit underlying the Notice of Motion (302-336). Three opposing affidavits were submitted by the government. They were verified June 11, 1973, which was the day before the motion came on to be heard, and were served the day the motion came on to be heard (366-368).

The first affidavit was executed by the United States Attorney Guy L. Heineman and was verified June 11, 1973. That affidavit was to the effect that he was concerned with this investigation (340, 341). One Martin H. Hershey, an Assistant District Attorney of Kings County alleged in his affidavit that before the granting of the first wire tap warrant and thereafter, he cautioned the police to minimize all telephone conversations not pertinent to the crime under investigation (342, 343). Hershey further alleged that a police sergeant named Olesk told him that he explained the procedure of minimization to "all police officers concerned" Hershey "periodically" checked with Olesk and was told by him that minimization was carried out (343).

Hershey concluded that the reasons he gave the directions as to the minimization was that he was aware that the law required it (343).

A U.S. agent, one Alexander Dovetko, alleged in his affidavit that he was cooperating with the state authorities who were investigating this case (344, 345). Prior to applying for the first wire tap order or warrant, the U.S. attorney called this agent's attention to minimization (345). The agent visited the 'plant' daily including weekends and saw the authorities actually minimize the surveillance (345, 346).

Dovetko further averred that he reviewed the logs and summarized them as follows: 496 calls were received; of these 120 were completed calls. Then 237 calls were listened to completely. 93 were listened to "initially" and then turned off. The logs indicated frequent occasions when non-relevant conversations were not "intercepted". Thus, calls of Cirillo's children were not monitored unless they were receiving messages for Cirillo (346).

Continuing further in his affidavit, Dovetko alleged that two agents reviewed the logs as to Cirillo and calls to a co-defendant named Sorrentino. Their analysis showed that 1,496 calls were made over Cirillo's telephone. 297 were incomplete leaving a balance of 1,199 conversations. Then 688 were listened to completely, the agents "believing" that they were pertinent; 511 calls initially were listened to to determine whether they were relevant or not. In some instances, some of these were re-listened to to determine whether the conversations "continued to be non-pertinent" (347).

In regard to a co-defendant Sorrentino, 2,180 telephone calls

were made. Of these 599 were incomplete leaving a balance of 1,505 calls; of these 838 were listened to completely "because they were believed to be pertinent at the time" (347). 747 were initially listened to but the listening was discontinued (348).

18 U.S.C. 2518(A)(8) provides in part that:

> ". . . The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as it will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order of extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction. Custody of the recordings shall be wherever the judge orders . . ."

In this case, petitioners made a timely claim that this direction was not adhered to but the Court below found it was not mandatory (351, 352). Therefore the execution of these warrants for the period of time involved was in effect unsupervised by any judicial authority.

The aforementioned affidavits submitted in opposition claim minimization was actually conducted. But it is submitted these are the conclusions of two prosecutors and the federal agent. While a quantitative breakdown was attempted in the agent's affidavit as aforesaid, at pages 346-347 of the Appendix submitted in the Court below, these allegations are not clear and the explanation of minimization is ambiguous. Thus the agent alleged that:

> "The logs themselves indicate frequent instances where non-pertinent conversations were not intercepted . . ." (346)

Just what percentage of these calls were deemed by the agent (there was no judicial finding) to be frequent was not stated by the agent. Here again, there is no judicial supervision and instead the privacy of persons subjected to the interception is left to a police officer.

Thus, it was shown above and it is found on pages 347 of the appendix filed in the Court below, that the agent claimed that of 1199 calls 688 were intercepted but that such interception may not have been within the scope of the statute. Petitioners can't say within the scope of the warrant because there was no direction to minimize. The agent did not state that these calls were within the permissible scope because the agent alleged that of the 688 calls that were listened to completely the agents and officers "having believed at the time that the conversations were pertinent".

However the time of the interception was not the time of the hearing. What was believed at the time of the hearing was not stated in the agent's affidavit. As a matter of fact the agent's statement is an admission which supports an inference and a very strong inference that the agents may have been mistaken when they initially listened to the subject conversations in regard to whether they were relevant or not.

There is a further admission by the agents that in some instances they relistened to conversations periodically to determine that the conversations continued to be non-pertinent.

Obviously petitioners or their counsel were in no position to rebut the conclusions alleged in the opposing affidavits submitted by two prosecutors and a federal agent. An evidentary and adversary hearing would have enabled this Court to have the

complete record of just how the minimization was conducted. Obviously petitioners can not make a factual showing because of the secrecy of the investigation and hence they could not raise an issue purely by affidavit. Even in a civil action where monetary damages are at stake in distinction to a criminal action where liberty is at stake, a motion for summary judgment need not be granted where the opposing affidavit can not allege facts showing that there is a triable issue; see Rule 56(f) of the Rules of Civil Procedure for the District Courts.

Furthermore, it would seem that the warrant stands or falls as it exists and can not be corrected by state officials submitting affidavits executed subsequent to the issuance of the warrant and after it was executed. See *Whitely v. Warden of Wyoming Penitentary*, 401 U.S. 560 (1971) footnote 8 at page 565. As was stated in *Johnson v. United States*, 333 U.S. 10, (1948), at page 14:

> ". . . It's protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enteprise of ferreting out crime . . ."

As was stated in *U.S. v. Huss*, 482 F. 2d 38, (Cir.-2d, 1973), at page 50:

> ". . . but we can not rely solely on the government's 'good faith' representation on such a critically contested issue. Indeed, the government's good faith did not present a legal wire tapping here, nor did the government's good faith prevent it from searching illegally, or from the rating and account of the circumstances of that search which the court found to be incredible . . ."

". . . speculation at this point only weights against the government's plea that its claim be taken at face value. This 'trust us to do the right thing' argument was roundly rejected by the Supreme Court in U.S. v. U.S. Court, supra. . . ."

"The teaching of the Supreme Court in Alderman v. United States, can not be avoided. We are instructed that when illegal electronic surveillance has come to light it is the adversary system, not representations by the government and not in camera decisions by the Court, which must be relied upon to determine whether overheard matter is 'relevant' to the taint hearing. Here, the logs represent a monitor's summary of the intercepted conversation. . . ."

It was thus noted by that Court especially in footnote 8, that *Alderman v. United States,* 394 U.S. 165 required an adversary proceeding or a full evidentary hearing so that a Court can determine factual issues especially where the factual issues are complex.

It is respectfully submitted furthermore, that the logs furnished to petitioners' counsel would serve as a basis for the cross examination of the government agent and other authorities if an adversary hearing were afforded the petitioners. That would be chief sanction of the furnishing. This was frustrated because the Court had no evidentiary hearing.

In *U.S. Bynum,* 475 F. 2d 832, (Cir.-2d, 1973), counsel for the defendants there made no application for an evidentary hearing to test whether the authorities minimized the execution of wire tap orders. Nevertheless the Court below remanded the matter

for an evidentary hearing. There was an indication in that opinion, therefore, that counsel for the defendants there did less than counsel for the petitioners here. Yet, the Court below decided this issue adversely to the petitioners.

Furthermore, it is very difficult to see just why if the authorities knew of the mandatory direction that the warrant or order contained a minimization provision, the authorities did not see to it that the order under review contained such provision. Even if the order did not contain such provision, originally, certainly it would have been of no moment for the authorities to call the attention of the Court that granted such order and have the direction supplied.

C. Wire tapping is unconstitutional and violative of the fundamental right of privacy under the 4th, 5th, 9th and 14th Amendments to the Federal Constitution either as applied to the facts of this case, or on the face of such statutes:

As Mr. Justice Douglas stated in his dissent, found in *Hudson v. United States*, 402 U.S. 965:

> "I dissent from the doctrine that an individual begins to lose his constitutional rights the minute he answers the telephone."

As Mr. Justice Douglas further said in his concurring opinion in *Gelbard v. U.S.*, 408 U.S. 41, (1972) at page 62:

> "I would hold that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 offends the Fourth Amendment, as does all wire tapping and bugging, for reasons which I have often expressed elsewhere . . ."

Furthermore, in the opinion of Mr. Justice Brennan in that case, at page 45 footnote 5, it was specifically noted that the petitioners there did not raise the constitutionality of the statute.

In *Kahn v. U.S.*, — U.S. —, (1974), 39 L. Ed., 2d 225, the prevailing opinion held that anyones voice over the tapped telephone is subject of interception. But that opinion specifically noted that the constitutionality of the wire tapping statutes was not presented to the Court, at page 234.

However, it was also noted on page 234 that:

> ". . . to be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a crime against the operations of organized crime. There is, of course, some tension between these two stated Congressional objectives . . ."

The Court below in its holdings found in *U.S. v. Tortorello*, 480 F. 2d 765, (Cir.-2d, 1973), recognized at pages 774-775 that there was possible tension between wire tapping as practiced under the statutes, and this Court's holding in *Osborne v. United States*, 385 U.S. 323.

While it must be recognized that the wire tap legislation under consideration, was a legislative (both federal and state) response to the demands this Court articulated in *Berger v. New York*, 388 U.S. 41, (1967); *Katz v. United States*, 389 U.S. 347 (1967); *Osborne v. United States*, 385 U.S. 323, (1966), it is respectfully submitted that in practice these demands cannot be met. This perhaps is in the nature of this type of surveillance and investigation. It is intangible, it does not require prior notice of

purpose and authority, it permits the seizure of words which are symbolic of ideas, it may have a "chilling" effect on people who are not criminals, but nevertheless desire to have the privacy of their conversation and communication of ideas or anything else people may want to communicate, untrammeled.

Thus, while a search warrant is primarily directed to the search and seizure of tangible property, search warrants also are limited to one execution within a given period, usually ten days.

Wire tap warrants can extend for thirty day periods, twenty-four hours a day and can apply to all who use the telephone. See *U.S. v. Kahn, supra.* Moreover, what is usually spoken over the telephone is subject to a "interpretation" by the police who claim that the words have a secondary meaning relating to the crime under investigation.

That wire tapping reaches the right of privacy in regard to free expression and even assembly, see *U.S. v. White,* 401 U.S. 745, (1971), dissenting opinion of Mr. Justice Douglas, at page 756, 762, 763, 764-766.

This Court held that the 9th Amendment to the Federal Constitution is grounded on privacy, *Griswold v. Connecticut,* 381 U.S. 479, (1965), page 484. See also concurring opinion of Mr. Justice Goldberg, with whom the Chief Justice and Mr. Justice Brennan joined, at page 488, 489.

See also *Roe v. Wade,* 410 U.S. 113, (153). While that case considered the due process clause of the 14th Amenement to the Federal Constitution as involving the right of privacy, it is submitted that such right can either be found in the due process provisions of the Bill of Rights or in the 9th Amendment to the Federal Constitution.

It is respectfully submitted that the 9th Amendment to the Federal Constitution is not just a catch-all provision, but has a definite meaning fixed in history.

> "Under the Ninth Amendment What Rights Are the 'Others Retained By The people?' 29 Federal Bar Journal, Summer 1970, No. 3, pages 219, et seq.

It is respectfully submitted that the rights retained by the People as articulated in the 9th Amendment is the right of privacy and the right to be free from eavesdropping. See "Under the Ninth Amendment, . . . , 14 South Dakota Law Review, 80 et seq., (Winter 1969)." On page 86 of that article it is noted that the 9th Amendment has been argued as being relevant to wire tapping or electronic surveillance. On pages 89-90, it is noted that the 9th Amendment envisaged certain basic rights whether the same are enumerated or otherwise. It is submitted these include the basic rights at common law.

At common law, eavesdropping was considered a nuisance. It was actionable. As was stated in *In Re Lanza*, 6 Misc. 2d 411, 163 N.Y.S. 2d, 576, at pages 579-580 where it was stated:

> "If we are to enjoy the benefits of a free society, we must have guaranteed to us the right of freedom of thought and speech. Freedom of speech, of necessity includes the right to be free from unwarranted secret listening of interference by others. The privacy of all free citizens is a fundamental and basic right. Without resorting to antiquity, we find in the Magna Carta a guarantee of security to all the men in that famous clause (39) that 'no freeman shall be taken, or imprisoned or disseised, or outlawed or banished, or anyways molested, nor will we pass upon

him, nor will we send upon him, unless the lawful judgment of his peers, or by the law of the land.' Blackstone in his Commentarys . . . defining the offense of eavesdropping, says: 'eaves-droppers, or such as listen under walls or windows or the eaves of a house to harken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance.' Corpus Juris Secundum says that in English Criminal Law eavesdropping was 'the offense of listening in on the walls or windows, or the eaves of a house, to harken after discourse, and thereupon to frame slanderous and mischievous tales.' . . . Bishop says that eavesdropping 'consists of a nuisance of hanging about the dwelling house of another, hearing tattle, and repeating it, to the disturbance of the neighborhood. . . ."

Volume XIV, Words and Phrases, Eavesdropping, p. 111, defines an eavesdropper as 'one who is secretly a listener to conversations between others, and would include a person who merely overheard communications or conversations between a husband and wife' . . . Eavesdropping was an indictable offense in common law . . ."

See also *In Re Lanza*, 4 A.D. 2d 252, 164 N.Y.S. 2d 534.

CONCLUSION:

It is respectfully submitted that the petition for the writ of certiorari be granted.

Respectfully submitted,

HAROLD BORG
Attorney for Alphonse Cirillo
A Member of the Bar of the
Supreme Court of the
United States

ARNOLD E. WALLACH
Attorney for Vincent Murphy
A Member of the Bar of the
Supreme Court of the
United States

Dated: New York, New York
June 4, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 676, 677, 684, 688, 730, 762, 763, 796—
September Term, 1973.
(Argued February 14, 1974 & Decided May 7, 1974.)
Docket Nos. 73-2426, 73-2615, 73-2554, 73-2796,
73-2555, 73-2644, 73-2645, 73-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILIENTHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants-Appellants.

Before:

Medina, Mansfield and Oakes,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, convicting (1) all appellants of conspiracy to distribute narcotics in violation of 21 U.S.C. §846, (2) Alphonse Cirillo, Vincent Murphy, Robert Venetucci and Theodore Lilienthal of possession of narcotics with intent to

distribute in violation of 21 U.S.C. §841, (3) Alphonse Cirillo, Vincent Murphy, Robert Venetucci, and Salvatore Sorrentino of attempting to distribute narcotics in violation of 21 U.S.C. §846, (4) Alphonse Cirillo, Vincent Murphy, Salvatore Sorrentino, and Theodore Lilienthal of distribution of narcotics in violation of 21 U.S.C. §841(a)(1), and (5) Lawrence Cesare of attempting to possess narcotics in violation of 21 U.S.C. §846.

The convictions of Gutierrez and Gaber are reversed. All other convictions are affirmed.

HAROLD BORG, Esq., Kew Gardens, N.Y. (Arnold E. Wallach, Esq., of counsel) *for Appellant Cirillo.*

STEPHEN R. LAIFER, Esq., Brooklyn, N.Y., *for Appellant Murphy.*

IRVING SABLE, Esq., Far Rockaway, N.Y., *for Appellants Sorrentino and Cesare.*

JACOB P. LEFKOWITZ, Esq., New York, N.Y., *for Appellant Venetucci.*

PAUL E. WARBURGH, Jr., Esq., New York, N.Y. (Kassner & Detsky, New York, N.Y., of counsel), *for Appellant Gutierrez.*

CHARLES T. McKINNEY, Esq., New York, N.Y., *for Appellant Gutierrez.*

CHARLES T. McKINNEY, Esq., New York, N.Y., *for Appellant Lilienthal.*

JULIUS WASSERSTEIN, Esq., Brooklyn, N.Y., *for Appellant Gaber.*

GUY L. HEINEMANN, Assistant United States Attorney (Edward John Boyd, V, United States Attorney for the Eastern District of New York, Raymond J. Dearie, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

On this appeal we encounter a narcotic distribution conspiracy of the familiar "chain type" involving sophisticated suppliers, middlemen and customers who dealt in substantial amounts of heroin, conducting their business through use of coded narcotics trade language or jargon in which innocent phrases were used to describe heroin, prices and parties. After a jury trial before Judge Orrin G. Judd of the Eastern District of New York all appellants were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. §846 (Count 9). Additionally appellants were convicted on other counts as follows:

Counts	*Appellants*[1]
1: (possession with intent to distribute 1 kilogram of heroin)	Cirillo and Murphy

1. Appellants were sentenced as follows:

Cirillo — 14 years, 9 months on Counts 1 and 2 (concurrent) and 10 years special parole; 10 years on Counts 7 and 9 (concurrent but consecutive to

2: (distribution of the same kilogram of heroin)	Cirillo, Murphy and Sorrentino
3 and 4: (possession of the same kilogram with intent to distribute and attempted distribution)	Venetucci
5 and 6: (possession and distribution of 1/2 kilogram of heroin)	Lilienthal
7: (attempted distribution of the 1/2 kilogram)	Cirillo, Murphy and Sorrentino

sentences on Counts 1 and 2) and 10 years special parole; $10,000 fine on Count 9.

Murphy — 10 years on Counts 1, 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Sorrentino — 10 years on Counts 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Venetucci — 9 years on Counts 3, 4 and 9 (concurrent) and 7 years special parole.

Lilienthal — 8 years on Counts 5, 6 and 9 (concurrent) and 5 years special parole; $2,500 fine on Count 9.

Cesare — 5 years on Counts 8 and 9 and 5 years special parole.

Guitierrez — 5 years on Count 9 and 5 years special parole.

Gaber — 5 years on Count 9 and 5 years special parole.

Presently all appellants except Cirillo are free on bail pending decision of their appeal.

8: (attempt to possess the 1/2 kilogram) Cesare

Finding insufficient evidence of guilt, we reverse the convictions of appellants Gutierrez and Gaber. The convictions of all the other appellants are affirmed.

The government's proof consisted largely of tapes and transcripts of some 40 intercepted conversations occurring over the home telephones of Cirillo and Sorrentino, supplemented by testimony of surveilling agents and a video tape of a meeting of four of the conspirators. Initial authorization for the wiretap of Cirillo's phone was given in a warrant order issued on October 31, 1972, by Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate Division, pursuant to New York's eavesdropping statute, N.Y.C.P.L. §§700.05, *et seq.*, after he found on the basis of affidavits submitted by the Kings County District Attorney and a state police detective, that there was probable cause to believe Cirillo was committing narcotics offenses and that evidence of these offenses could be obtained by wiretapping Cirillo's phone. This warrant was extended for four additional 30-day periods by Justice Rabin of the Appellate Division.

Initial authorization for the wiretap of Sorrentino's phone was given in a warrant issued on January 25, 1973, pursuant to the New York statute by Justice Irwin Brownstein of the New York State Supreme Court, which was extended for two additional 30-day periods.

The evidence, viewed in the light most favorable to the government, reveals the following: At 7:00 A.M. on January 18, 1973, Cirillo called Sorrentino and said he wanted to see

Sorrentino and "Bobby" (Venetucci). Later that morning Sorrentino and Venetucci spent two hours at Cirillo's home in Little Neck, New York. Thereafter Sorrentino phoned Cirillo to ask whether he should "take the kid out of school" at around 4:00 P.M., to which Cirillo replied, "No, its figured most likely, like the kids going to school tonight." James Garcia, a detective with the New York City Police Department, testified, on the basis of his extensive experience in narcotics investigations, that he would interpret the "kids going to school" language as narcotics coded vocabulary for delivering narcotics.

As the result of a further phone call Cirillo, carrying a rolled up brown paper bag, a type of unobstrusive container frequently used for transportation of narcotics, and accompanied by Murphy, met at 10:30 P.M. with Sorrentino at the apartment of the latter's mother on West 8th Street where they were joined by Venetucci, who arrived at about 11:30 P.M. and left 15 minutes later. Venetucci drove directly to 120 Bay 14th Street in Brooklyn where he met appellant Frank Gutierrez on the street. Both then spent two hours in Gutierrez's apartment, following which Venetucci returned to West 8th Street and Avenue U, where he was seen arguing on the street with Sorrentino, Cirillo, and Murphy.

On the next day, January 19, a series of phone conversations between Cirillo and Sorrentino (during one of which "Bobby" Venetucci was present on Sorrentino's end of the wire) revealed that the argument had arisen because of Venetucci's failure to come up with the money for the narcotics that had been delivered to him the night before by Cirillo, Murphy, and Sorrentino. Venetucci had been unable to locate his "partner" who was supposed to make payment. Sorrentino reported to Cirillo that although Venetucci called from "Bay 14th"

(Gutierrez's address), the money had not been received. Sorrentino assured Cirillo that he had told "Bobby" (Venetucci) that Cirillo would not take the "thing" back but wanted the agreed price of $30,000. (At that time the market price for a kilogram of 50% pure heroin ranged from $25,000 to $38,000.) In an effort to obtain the purchase price, a meeting was held that night between Cirillo, Murphy, and Sorrentino, followed by a Sorrentino-Venetucci meeting. The upshot was that while "Bobby" (Venetucci) was finally able to reach his partner "Frankie" by telephone, neither "Bobby" nor "Frankie" could produce the money. Meanwhile Sorrentino expressed concern that the "stuff" (narcotics) was still in Venetucci's house.

The efforts to obtain payment of the $30,000 price for the narcotics continued with Cirillo, the supplier, putting pressure on Sorrentino, the middleman, and the latter in turn pressing Venetucci, who supposedly was looking to his "partner" for payment. On the afternoon of January 22, Venetucci went to Grace's Discount Dress Shop on 11th Avenue in Brooklyn, owned by the wife of Gutierrez, and shortly thereafter Gutierrez entered. Two hours later Venetucci left the shop but returned within a half hour when, before reentering, he walked up and down the opposite side of the street in an apparent effort to determine whether he was being followed. Venetucci finally left the shop at 6:00 P.M. and proceeded in his automobile to Staten Island, driving evasively when he spotted surveillance agents behind him.

By January 25, still unpaid, Cirillo and Sorrentino, who were beginning to lose their patience, resolved to give "Bobby" (Venetucci) a "good workout" and then get the "dress off him" (i.e., secure the return of the narcotics). In this they succeeded, for on the evening of January 26 Sorrentino, Murphy, and

Cirillo, who was carrying a brown paper bag, all entered Sorrentino's house in Brooklyn. Three days later Venetucci was told by Sorrentino that "they got rid of it for 22" (i.e., sold the narcotics for $22,000), leaving an $8,000 balance, which Venetucci and his partner were expected to pay. Negotiations regarding the $8,000 deficit followed, with Venetucci trying to persuade Cirillo and the "other guy" to absorb half the loss on the understanding that Sorrentino and Venetucci would make up the other half. Cirillo, however, kept insisting that Sorrentino, Venetucci and "Frankie" pay the entire $8,000.

Discouraged but apparently not resolved to abandon their business relationship, Sorrentino and Cirillo, on March 9, 1973, began discussing another transaction. At 5:45 P.M. on that date Sorrentino advised Cirillo by phone that he had "met some nice people" who thought the "figure" for the "dresses" (i.e., the price for narcotics offered by Cirillo and Sorrentino) was "very good." Several days later, on March 14th, Sorrentino called Cirillo and ordered another "dress" which, according to Detective Garcia, meant another order of narcotics. At this point Cesare, the prospective purchaser, appeared on the scene and asked Sorrentino for delivery of "a sample of that dress." Upon receiving this message from Sorrentino, Cirillo went into action. He called Lilienthal's home and, upon learning that "Ted" (Lilienthal) was not expected home until 7:00 P.M., left a message instructing Ted to bring him back "those income tax forms, the one . . . half filled out . . ." (i.e., a half-kilo of heroin). With a view to making the purchase Cesare, accompanied by Gaber, proceeded to the White Castle parking lot near Sorrentino's home where they waited in vain for 3 1/2 hours for the narcotics to be supplied by Lilienthal and departed only after Sorrentino and Cirillo were unable to locate the supplier (Lilienthal).

On the following day, March 15th, Cirillo reached Lilienthal by phone and in response to his request for the "paper that I half filled out" (half-kilo of narcotics) Lilienthal indicated that he had it. Shortly thereafter Lilienthal visited Cirillo's residence, apparently for the purpose of delivering the half-kilo. Cirillo then called Sorrentino to advise that he and "Murph" would go to Sorrentino's residence. Sorrentino then told Cesare, the prospective customer for the half kilo, to call back some time after 7:30 P.M.

At 7:15 P.M. on March 15th Cirillo and Murphy, intending to rendezvous with Sorrentino for the narcotics delivery, entered the parking lot near Sorrentino's house where they were promptly arrested by federal narcotics agents and New York police. A search revealed a half kilo of heroin and small quantities of cocaine in their possession. The area was quickly cleared in order not to arouse Sorrentino's suspicions. At 8:00 P.M. Sorrentino informed Cesare by phone that he was still waiting for his "friends" (i.e., Cirillo and Murphy) to get there.

At approximately 10:00 P.M. on March 14th Cesare, the prospective customer, together with Gaber and an individual identified as Jerry Collins, arrived at Sorrentino's house. Cesare and Gaber went inside and exited with Sorrentino at 10:15 P.M. Sorrentino talked with Cesare, Gaber and Collins in the parking lot outside his house for about 45 minutes before he got in his own car and drove around for approximately a half hour. When Sorrentino returned, all four men went to a nearby restaurant until approximately midnight when, after making a call from a nearby public telephone booth, Sorrentino went back into his residence and the other three men drove off in their car. At this point the car driven by Cesare was stopped by a narcotics agent and, when all the occupants were asked to produce iden-

tification. Gaber said that they were only in the area to see "Brother." Cesare added, "[Y]eah, Brother Salvatore Sorrentino."

In addition to the tapes and transcripts and the testimony of the surveilling agents, the government introduced the items seized from Cirillo and Murphy on the evening of March 15th, which included the brown paper bag, bag of half kilo of heroin, a small bag of cocaine taken from Cirillo, and a small amount of cocaine wrapped in tin foil that had been taken from Murphy.

On July 27, 1973, the jury returned a verdict finding all appellants guilty of conspiracy to distribute narcotics and various appellants guilty of narcotic offenses as shown above. However, Gutierrez was found not guilty of attempting to possess narcotics in connection with the January transaction and Gaber was found not guilty of attempting to possess narcotics in connection with the March transaction. We turn to the numerous claims of error asserted on this appeal.

DISCUSSION

Use of Wiretap Evidence

Several appellants challenge the constitutionality of the New York State eavesdrop statute, N.Y.C.P.L. §§700.05, *et seq.* However, the provisions of that statute are authorized by and conform to similar provisions of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, see 18 U.S.C. §§2516(2), 2518 (1970), which we held to be constitutional in *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). See also *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411

U.S. 905 (1973). For the reasons stated in *Tortorello* we reject the constitutional claim and turn to the other wiretap issues raised by appellants.

(a) *Validity of Original Wiretap Order*

The first warrant order authorizing a wiretap of Cirillo's home phone, which was issued on October 31, 1972, and broadly authorized interception until November 29, 1972, of communications of types particularly described, contained no direction that the interception should be conducted "in such a way as to minimize the interception of communications not otherwise subject to eavesdropping," as required by §700.30(7) of the statute, see N.Y.C.P.L. §700.30(7).[2] Several appellants join in Cirillo's argument that the omission of a minimization directive rendered this initial order fatally defective so that any conversations intercepted as a result of it or its subsequent extensions[3] should have been held inadmissible at trial. We disagree.

The first six paragraphs §700.30 of the state statute limit the

2. Section 700.30 provides:

"An eavesdropping warrant must contain:

*****

"7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days;. . . ."

3. Since the application for these extensions was based on conversations intercepted as a result of the first order, if the first order were invalid, the subsequent extensions would be "tainted" by the primary illegality.

scope of an eavesdropping warrant by requiring it to specify, among other things (1) the name of the person, if known, whose communications are to be intercepted, (2) the nature and location of the communications facilities as to which authority to intercept is granted, (3) a particular description of the type of communications sought to be intercepted, (4) a statement of the particular designated offense to which they relate, (5) the identity of the law enforcement agency authorized to intercept the communications, and (6) the period of time during which the interception is authorized. Paragraph 7 then provides that the warrant must also contain the above-quoted direction to "minimize" the interception of non-pertinent conversations. Recognizing that paragraph 7 is essentially a summation of "the more specific requirements of 700.30(1)-(6), all of which lead to 'minimization,' " we held in *United States v. Manfredi*, Slip Opin. at 5593, 5611-12 (2d Cir. Nov. 23, 1973), that, when the orders and supporting affidavits are construed in "a commonsense and realistic fashion," see *United States v. Ventresca*, 380 U.S. 102, 108 (1965), mere omission of the "talismanic minimization language" from a wiretap order otherwise in compliance with the statute would not render the warrant invalid under state law, which governs, at least where the supporting affidavits evidenced an actual knowledge of the minimization requirement and an agreement to abide by it. See *People v. Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973). While here the supporting affidavits contained no specific agreement "to limit the seizure of conversations to those specifically pertaining to the [alleged] Penal Law violations," as the affidavit did in *Manfredi*, there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it.

The investigation of Cirillo was conducted jointly by the

District Attorney for Kings County and the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Martin Hershey, the assistant in charge of the Narcotics Bureau in the King's County District Attorney's Office who directed the investigation, Alexander Dovetko, a special agent with BNDD who supervised the federal agents engaged in the investigation, and Guy Heinemann, the Assistant United States Attorney for the Eastern District who also participated in the joint investigation, all submitted affidavits stating that they were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap, who were ordered to turn off all recording and listening devices whenever they were able to determine that nonpertinent conversations were being intercepted. Agent Dovetko visited the Cirillo wiretap almost daily from its inception and personally observed agents and officers complying with these instructions. Furthermore, during the period covered by the first warrant, the listening and recording of over a quarter of the completed calls was terminated as soon as nonpertinency was determined.[4] These logs, which we have reviewed, support Dovetko's conclusions.[5]

In other contexts New York appellate courts have excused purely technical defects in the form of a search warrant that has

4. The affidavit stated that "[o]f 496 telephone calls made or received, 120 were incomplete (no answer, busy or wrong number). Approximately 287 were listened to completely and approximately 93 were listened to only initially and then turned off when it was determined that they were non-pertinent."

5. Termination for non-pertinency is indicated on the logs by the letters "N/P." Whenever these letters appear, there is no further description of the conversation in the log and the log indicates, by showing that only one or two feet of tape elapsed during that particular interception, that the recording and monitoring devices were shut off as soon as the determination of non-pertinency had been made.

been executed according to statutory requirements. Compare *People v. Glen*, 30 N.Y.2d 252, 331 N.Y.S.2d 656, *cert. denied sub nom. Baker v. New York*, 409 U.S. 849 (1972) (the "fact that the warrant would on its face authorize an improper search does not undo it for all purposes") with *People v. Varney*, 32 App. Div. 2d 181, 301 N.Y.S.2d 330 (1969) (technical defects may be overlooked where search is conducted lawfully). The omission of a minimization directive was a "technical defect" under the circumstances of this case where its absence could not, assuming proper attention to the provisions of the warrant, lead to a greater invasion of privacy than was justified by probable cause. Cf. *Smith v. United States*, 360 U.S. 1, 9 (1959) (deficiencies are "technical" where no substantial rights are involved). Since the first order in this case was in "substantial compliance" with the statute we hold that it was valid. Compare *Manfredi, supra*, with *United States v. Poeta*, 455 F.2d 117, 121 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) and *United States v. Rizzo*, Slip Opin. at 1675 (2d Cir. Feb. 7, 1974).

b) *Failure to Hold a Minimization Hearing*

Appellants next argue that the district court should not have denied their motions to suppress the wiretap evidence without first holding an evidentiary hearing to determine whether minimization had in fact been achieved during the entire course of the wiretap of the Cirillo and Sorrentino phones. In denying the motions to suppress the district court relied on the Dovetko, Hershey and Heinemann affidavits and on his own review of the logs kept during the Cirillo and Sorrentino wiretaps.

The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed further that at all times the Cirillo and Sorrentino

wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity."[6] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the

6. The affidavit stated:

"Special Agent Nicholas Alleva and Special Agent William Malarney, have reviewed the logs for both the Cirillo and Sor...tino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be non-pertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be non-pertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time, 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent."

statutory minimization directive. See *United States v. Rizzo*, Slip Opin. at 1491-95 (2d Cir. Jan. 17, 1974). Indeed, the prima facie showing is even stronger here than in *Rizzo*, which also upheld a wiretap conducted pursuant to the New York statute. There the state police detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve minimization.[7] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.

(c) *"Expert" Interpretation of Narcotics Jargon*

Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics

7. Even assuming *arguendo* that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization. Compare *United States v. Bynum*, 485 F.2d 490, 500-02 (2d Cir. 1973) with *United States v. Fino*, 478 F.2d 35 (2d Cir. 1973) and *United States v. Tortorello*, 480 F.2d 764 (2d Cir. 1973).

investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States v. Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir.), *cert. denied*, 410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

(d) *"Surprise" Disclosure of Venetucci Conversations*

Venetucci attacks the introduction at trial of two conversations between him and Sorrentino, which were intercepted shortly after the wiretap of Sorrentino's phone had begun on January 29, 1973. The basis for this objection is the failure of the prosecutor, Assistant U.S. Attorney Heinemann, to make any pretrial disclosure that these conversations had been intercepted.

Venetucci alleges that Heinemann represented to him on two occasions that none of the government's tapes or transcripts contained any conversation participated in by Venetucci. The first occasion was on May 17, 1973, when, in response to discovery motions, Heinemann agreed to furnish not only the wiretap orders with their supporting affidavits but also those transcripts of tapes that had actually been compiled, and to make all tapes and logs available for listening and inspection. Although Heinemann is alleged to have stated on that date that

none of the government's tapes contained any Venetucci conversations, Heinemann did not recall having made any such statement. Before trial Heinemann, after stating that he expected all "of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel," furnished to Venetucci's counsel approximately 90 transcripts of tape recorded conversations. The second occasion occurred after the trial had begun on July 9 when Venetucci's counsel moved for a mistrial on the ground that Heinemann had implied in his opening statement to the jury that the government actually did have tapes of Venetucci's conversations which would incriminate him.[8] However, responding to the court's inquiry as to whether he meant to refer to wiretaps of Venetucci conversations, Heinemann had said "No, I don't think there is anything I said to indicate that."

Heinemann did not disclose that tapes of Venetucci conversations existed until the fifth day of appellants' trial when he informed the court that he had discovered the tapes on the previous evening in reviewing the logs kept during the Sorrentino wiretap. Heinemann subsequently offered, and the district court admitted, the transcripts and tapes of two conversations between Sorrentino and Venetucci which occurred on January 29, 1973 and on February 1, 1973, respectively, concerning their joint

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8. In moving for a mistrial, counsel for Venetucci referred to Heinemann's statement that:

> "Later it became clear exactly how much money was to be paid for the heroin that was brought to Sorrentino's mother's house that night (i.e. January 18). $30,000. And $10,000 was ultimately the payment that was demanded. Bobby Venetucci, as a sign of his good faith. This we know because the defendants talked about it on the telephone, and the telephone of Alphonse Cirillo during January, 1973, was under electronic surveillance by court order."

obligation to make up to Cirillo the $8,000 deficit resulting from the sale of the first lot of narcotics at $22,000 instead of the $30,000 which Venetucci was to pay for it. Venetucci argues that he was prejudiced by this delayed "bombshell" because (1) he was denied any opportunity to participate in a pretrial suppression motion and (2) his counsel was misled in the preparation of his own opening statement, where he emphasized that, despite the government's extensive electronic surveillance, no Venetucci conversation had been intercepted.

We agree with Venetucci that the government should have produced the transcripts of his conversations with Sorrentino prior to trial in response to his explicit discovery requests, see *United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations.

At least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel. Our review of these logs reveals that identification of each caller is neither difficult nor particularly time consuming. In each instance where a call was intercepted the log entry identified the parties (where identifiable) before giving a brief description of the conversation. Indeed, on the very third page of the Sorrentino logs there is a log entry, highlighted by two asterisks, which reads, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on. . . ."[9] (emphasis

9. "MO Bobby, MI Brother" is shorthand for Male/Out (i.e., male calling from outside) to Male/In (i.e., male inside receiving call).

added). All counsel were at all times aware that "Bobby" and "Brother" were the nicknames for Venetucci and Sorrentino, respectively.

Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity of the wiretap orders or on the conduct of the wiretap operation[10] borders on the frivolous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States v. Allsenberrie*, 424 F.2d 1209, 1215 (7th Cir. 1970); *Pierce v. United States*, 414 F.2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States v. Padrone*, 406 F.2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to

10. Venetucci asserts that his arguments against the wiretap would have been entirely different from those actually raised by the other defendants. He says he would have focused on the New York rather than the federal legislation (although the New York legislation was clearly authorized and conformed to the federal legislation), on the existence of probable cause for the first order (rather than its form) and the numerous extensions of the first order. We have considered these arguments but find them insufficient to change our already-expressed views.

the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Sufficiency of the Evidence

Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of *non*-hearsay evidence that the latter was a party to the conspiracy. See *Glasser v. United States*, 315 U.S. 60, 74 (1942); *United States v. Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied sub nom. Lynch v. United States*, 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 387 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial, see *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare *United States v. Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964) ("mere meeting was no evidence [that persons were] conspirators") and *United States v. Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) with *United States v. Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

As to most defendants this threshold requirement as to admissibility of hearsay declarations of co-conspirators was clearly

met. The tapes, transcripts, surveillance, and other circumstantial evidence provided overwhelming non-hearsay evidence of a conspiracy to distribute heroin in which Cirillo and Murphy were suppliers, Sorrentino was a middleman, and Venetucci and Cesare were customers. Lilienthal, Gutierrez and Gaber argue, however, that there was insufficient non-hearsay evidence to permit the trial court to find by a fair preponderance of the evidence, which is the governing standard, that they had intended to participate in either the January or March transactions. Therefore, they say, it was reversible error to permit the jury to consider the incriminating hearsay declarations of the other co-defendants as evidence against them.

(a) *Lilienthal*

The non-hearsay evidence of Lilienthal's participation in the March transaction was clearly sufficient to permit the introduction of statements by co-conspirators in furtherance of the conspiracy. The principal item was Lilienthal's devastatingly incriminatory telephone conversation with Cirillo on March 15 in which Cirillo asked "I got to—I got to have it before the income tax is filled out. You got the paper that I half filled out?" (i.e., have you got the half kilo of heroin?), to which Lilienthal responded "Oh yeah, yeah, yeah," and advised Cirillo that he would stop by in about an hour. In a short while Lilienthal left his residence and later in the day his car was seen at Cirillo's house. Shortly after Lilienthal's visit to Cirillo's house, Cirillo and Murphy went to the White Castle parking lot near Sorrentino's house where they had failed to appear on the previous night because Cirillo had been unable to communicate to Lilienthal his request for those "half filled out" income tax forms (i.e., the half kilo of heroin). When they arrived at the parking lot Cirillo and Murphy were arrested and a package

containing a half kilo of heroin was discovered on Cirillo.

From this non-hearsay evidence, including Lilienthal's own statements and conduct, the jury could infer that he agreed to and did supply to Cirillo the half kilo of heroin needed for sale in the chain of distribution. The court acted properly, therefore, in admitting hearsay statements of co-conspirators made in furtherance of the conspiracy, including Cirillo's "statement to Sorrentino" during the aborted January transaction that "Teddy" (Lilienthal) was a supplier who was always a "million percent, nothing ever goes wrong" and another statement by Cirillo to Sorrentino before the March transaction to the effect that "my friend Ted [has] got some papers for you," (i.e., some heroin). These statements confirmed the non-hearsay evidence surrounding the meeting and warranted the jury's finding beyond a reasonable doubt that Lilienthal was a member of the conspiracy and a participant in the March transaction. See *United States v. Manfredi*, ——— F.2d ——— (2d Cir. Nov. 23, 1973), Slip Opin. 5593; *United States v. Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States v. Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

(b) *Gutierrez*

Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators. The only independent non-hearsay evidence of Gutierrez's possible participation in the conspiracy related to the aborted January, 1973, transaction. On January 18th Venetucci, immediately after leaving his rendezvous with Cirillo, Murphy and Sorrentino at Sorrentino's mother's apartment, for two hours visited Gutierrez's home. At the conclusion of that meeting Venetucci drove back to rejoin

Cirillo, Murphy and Sorrentino. On January 22nd Venetucci visited with Gutierrez for four hours at the dress store of the latter's wife, with an interruption when Venetucci left and then returned only after checking for surveillance. Venetucci finally departed, driving evasively to Staten Island. There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of narcotics by Gutierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the court to find by a fair preponderance that he had participated.

While the two visits raise suspicion, suspicion is not enough. For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits. Relying on *United States* v. *Manfredi, supra,* the government contends that in addition to Venetucci's visits there was circumstantial evidence in the form of "verbal acts" by Sorrentino that showed Gutierrez's participation in the conspiracy. It is true that in several Sorrentino-Cirillo telephone conversations Sorrentino referred to "Frankie" Venetucci's "partner." But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible.

Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof.

Although *Manfredi* went quite far in admitting "verbal acts" of a co-conspirator, it is clearly distinguishable from the present case and cannot be expanded to admit Sorrentino's hearsay statements. In *Manfredi* the statements were those of the defendant Joseph LaCosa regarding *his own personal relations* with Manfredi as a narcotics supplier and could be coupled with his own evasive personal conduct upon the occasion of his visits to Manfredi's home. We treated LaCosa's statements as circumstantial evidence because they represented the declarant's *personal knowledge.* When added to the other corroboratory circumstances we concluded that they had a "ring of reliability." Compare *Manfredi* with *United States* v. *D'Amato,* ——— F.2d ——— (2d Cir. March 14, 1974), Slip Opin. 2199, 2205-08. No such "ring of reliability" exists here. In the first place the statements relied upon by the government are not those of Venetucci with respect to his personal dealings with Gutierrez, which might conceivably fit within *Manfredi,* but statements of Sorrentino, who had no personal relationship at all with Gutierrez. For all we know Sorrentino may have been basing his description of Gutierrez as Venetucci's "partner" on rumors that he had heard from persons other than Venetucci. To admit such rank "double hearsay" as "circumstantial evidence" or "verbal acts" would be to make a mockery of the "non-hearsay" threshold requirement.

The danger inherent in permitting such hearsay to be used as the basis for admitting still more hearsay declarations of co-conspirators is rather obvious. Aside from the lack of opportunity to cross-examine the declarant and the obvious second-hand nature of Sorrentino's statements, out-of-court statements by Venetucci himself were introduced which suggested that Gutierrez had not agreed to participate in the

narcotics scheme. Thus, in a conversation with Sorrentino on February 1, 1973, with respect to obtaining a loan to make up the $8,000 deficit in the price ultimately secured by Cirillo for the narcotics which Venetucci had agreed to buy, Venetucci expressly denied any understanding that "Frankie" was to share in payment of the deficit.

It may be that the "non-hearsay" threshold requirement for admission of hearsay declarations of co-conspirators, which had been liberalized through a series of modifications since its inception, compare *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942), and *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945), with *United States* v. *Geaney*, *supra*, will be relaxed even further to permit introduction of certain statements of co-conspirators regardless of their unavailability for cross-examination, subject to conditions that will be deemed sufficient to guarantee their trustworthiness. See Proposed Rules of Evidence for the United States District Courts and Magistrates, Rules 803(1)-(2). Until such a change is made, however, we must adhere to the standing rule which requires us to exclude hearsay where the threshold test has not been made.

Since the proof of Sorrentino's statements as to the reasons for Venetucci's visit to Gutierrez was inadmissible as evidence of Gutierrez's participation, the trial court could not properly consider it in applying the "fair preponderance" test with respect to Gutierrez. Cf. *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970); *General Tire of Miami Beach, Inc.* v. *NLRB*, 332 F.2d 58, 61 (5th Cir. 1964). In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt. See *United States* v. *Fantuzzi*, 463 F.2d 683, 689-90 (2d Cir.

1972); *United States* v. *Cimino*, 321 F.2d 509-10 (2d Cir. 1963, *cert. denied*, 375 U.S. 974 (1964); *United States* v. *Ventvena*, 319 F.2d 916, 949 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied sub nom. Lassa* v. *United States*, 361 U.S. 863 (1959). See also *United States* v. *Glover*, 306 F.2d 594 (10th Cir. 1962).

(c) *Gaber*

The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test.[11] See *United States* v. *Fantuzzi*, *supra*; *United States* v. *Cimino*, *supra*, and other decisions cited on page 3316.

The decisions relied upon by the government do not support its argument that there was sufficient non-hearsay evidence of Gaber's membership in the conspiracy to admit the hearsay

11. Cesare's statement in one of his March 14 telephone conversations with Sorrentino to the effect that he (Cesare) had "Gabe" (Gaber) with him added nothing to the government's proof of guilty knowledge on the part of Gaber.

declarations of alleged co-conspirators. In *United States* v. *Calabro*, 449 F.2d 885 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971), in affirming a narcotics conviction, we regarded "of critical importance" the fact that the defendant, who had been present at several meetings between the seller and the intended customer, an undercover agent, carefully scrutinized the agent and at one point actually frisked him.[12] And in *United States* v. *Ragland*, 375 F.2d 471, 473 (2d Cir. 1967), we upheld the admission of hearsay evidence against a defendant only after noting that a co-defendant had not only used the "slanguage" of narcotics dealings *in the defendant's presence* but had also explicitly referred to "narcotics." Compare *Calabro* and *Ragland* with *Ong Way Jong* v. *United States*, 245, F.2d 392 (9th Cir. 1957) (conviction reversed although defendant was constantly with co-defendant who sold narcotics); *Glover* v. *United States*, 306 F.2d 594 (10th Cir. 1962) (conviction refersed although defendant seen in vicinity of narcotics transaction between co-defendant and undercover agent) and *People* v. *Garcia*, 201 Cal. App. 2d 589, 20 Cal. Reptr. 242 (1962) (conviction reversed although defendant present at time of narcotics sale).

Since the government failed to adduce sufficient non-hearsay evidence of Gaber's participation in the conspiracy, his conviction must be reversed.

Variance Between Proof and Indictment

Venetucci, Lilienthal and Cesare[13] advance the argument,

12. It was not actually clear from the evidence that the defendant himself frisked the undercover agent. The frisking occurred when the agent was standing at the urinal in a restaurant's men's room as the defendant and his colleague passed behind him.

13. Gutierrez and Gaber also complain of a variance as to them but we need not consider these claims since we have already concluded that the evidence was insufficient to connect them with either the January or March transaction.

frequently asserted in conspiracy cases, see *United States* v. *Borelli*, 336 F.2d 376, 380 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), that even assuming the involvement of each in one of the two transactions, the evidence showed two independent conspiracies, one in January and the other in March, 1973, rather than the single on-going conspiracy alleged. The issue turns on whether the proof warranted an inference that each of the three, in dealing with a member of the core group (Cirillo, Murphy and Sorrentino), was aware of, and thus knowingly furthered, the core group's overall on-going venture or partnership. See *Borelli*, *supra* at 385. Although a single transaction with, or function performed for, a representative of the core group may under some circumstances be insufficient to warrant an inference of knowledge of the extensive nature of the core group's activities, see *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), we have recognized that it is "not an arbitrary rule which is to be applied rigidly and without reason." See *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Indeed, just recently we said that "it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *United States* v. *Arroyo*, ——— F.2d ——— (2d Cir. Mar. 22, 1974), Slip Opinion. 2314-15.

We are not here confronted, however, with merely a single delivery or purchase on the part of each of these three appellants (Venetucci, Lilienthal and Cesare) which, without more, might not support knowledge of a broader conspiracy, see, e.g., *United States* v. *DeNoia*, *supra*, but with deeper involvement on the part of each of these participants. Venetucci met on at least two

occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo*, ——— F.2d ——— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

In the cases of Lilienthal and Cesare the evidence shows, in addition to their participation in a transaction involving a large quantity, that they used narcotics code language in their dealings, Lilienthal making a delivery of a half kilo in response to Cirillo's request for "half-filled out" income tax papers and Cesare negotiating for the "sample of the dress." From these circumstances, including their use of pre-arranged code language, the jury could infer knowledge that they were participating in a continuing major business which extended in scope beyond the particular transaction and depended for its success upon a chain of distribution in which each principal played an essential part. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967).

Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States*, 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which

was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that "[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence . . . as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators." In *Blumenthal* v. *United States*, 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a similar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.

Miscellaneous Other Points

(a)*The Contents of the Paper Bag*

Sorrentino argues that his conviction on Count 2 (distribution of one kilogram of heroin on January 18, 1973) must be reversed since the government offered no direct proof that the paper bag carried by Cirillo to the meeting with Murphy, Sorrentino and Venetucci at Sorrentino's mother's apartment on the evening of January 18 contained heroin. We disagree. There was ample circumstantial evidence that the bag contained heroin. The delivery of the bag was the result of Sorrentino-Cirillo telephone negotiations in narcotics jargon and was followed by angry discussions regarding Venetucci's failure to deliver the "thirty," (e.g., $30,000), the approximate going price for a 50% pure kilogram of heroin. Later Cirillo and Sorrentino agreed to get the "dress" (i.e., narcotics) off Venetucci.

(b) *The Introduction of the Cocaine Found on Murphy and Cirillo*

Appellants Murphy and Cirillo argue that the trial court should not have permitted the government to introduce the small quantities of cocaine found on them at the time of their arrest (in addition to the half kilogram of heroin found on Cirillo) since it was evidence of crimes other than those charged in the indictment. But here the cocaine was relevant to refute the position which the government could anticipate and which counsel for Cirillo actually tried to establish during cross-examination of government witnesses, i.e., that the heroin was planted on Cirillo as a frame-up by the arresting officers. See *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973); *United States* v. *Wright*, 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In any event admission of the cocaine as evidence of guilty knowledge on the part of Cirillo and Murphy was well within the trial court's wide discretion. See *United States* v. *Deaton*, 381 F.2d 114, 117-19 (2d Cir. 1967).

(c) *The Jury Charge*

During his charge to the jury the trial judge instructed that they should consider the wiretap evidence since he had determined that the wiretap orders were properly issued. "If I am wrong," he continued, "somebody else can reverse me, but you are bound to take my view of the law." Appellants Murphy and Cirillo argue that this statement, to which they excepted, impermissibly tended to establish a similar train of thought in the minds of the jurors—i.e., if they should render an erroneous verdict, someone else would reverse them. The unnecessary remark is confusing and conceivably could be interpreted several ways. However, even accepting the interpretation given to it by

appellants, we are satisfied that under the circumstances of this case it was clearly harmless, in view of the overwhelming evidence against Murphy and Cirillo, including the tapes, visual surveillance and arrest with a large quantity of narcotis in their possession.

Conclusion

The convications of appellants Gutierrez and Gaber are reversed. All other convictions are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ALPHONSE CIRILLO, VINCENT MURPHY, et al.,
Defendants.

73-CR-352
June 27, 1973

Appearances:

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United States Attorney
Attorney for United States of America

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JUDD, J.

MEMORANDUM AND ORDER

Defendants Alphonse Cirillo and Vincent Murphy, joined by certain of their co-defendants, have moved to suppress evidence obtained pursuant to New York State wire-tap orders. They are under indictment for the illegal sale of heroin and conspiracy to violate the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The primary attack is based on the fact that Mr. Justice Shapiro's order did not expressly provide for "minimization." The interceptions which it authorized were, however, restricted to "communications [which] pertain to the commission of the crime hereinabove mentioned."

Facts

There were five orders concerning telephone facilities alleged to be used by defendant Cirillo, the first signed by J. Irwin Shapiro, Associate Justice, Appellate Division, Second Department, and the next four by Presiding Justice Samuel Rabin of the same Court. There were three orders concerning a telephone used by defendant Sorrentino, all signed by Mr. Justice Irwin Brownstein of the Supreme Court, Kings County. All the orders except the first contained an express direction to minimize the interception.

The first three orders concerning defendant Cirillo were based on lengthy affidavits by Detective Douglas LeVien, and the fourth and fifth Cirillo orders were based on lengthy affidavits by Detective James Garcia. The three Sorrentino orders were also based on lengthy affidavits by Detective James Garcia.

The first LeVien affidavit cited information from a registered informant, whose information in the past had led to several arrests and convictions. The informant said that he had learned

from defendant Cirillo that he brought in large quantities of heroin about four times a year, and had received 50 kilograms through Miami about three months before; and that he had seen a sample of heroin in Cirillo's living room and had heard conversations on the telephone about narcotic sales and prices. Confirmatory details from surveillance and other investigation were supplied.

Defendants have submitted a 31-page affidavit challenging the sufficiency of the LeVien and Garcia affidavits to satisfy the requirements of 18 U.S.C. § 2518. Defendants ask that the informant be produced in court for cross-examination. They assert that the order should not have been extended because no information was received concerning an anticipated 200 kilogram shipment. Much of the defense affidavit is devoted to denying the sinister interpretations put on intercepted conversations when detectives set forth the need for extensions of the wire-tap orders.

Finally, defendants complain that the orders did not require reports to the judges who signed them, as is permitted by 18 U.S.C. § 2518(6).

Notice was given to defendants Cirillo and Murphy on May 9, 1973, pursuant to CPL § 750.50(3) that eavesdropping had been conducted from October 31, 1972 to March 15, 1973.

The government has submitted an affidavit of the Assistant United States Attorney who participated in the joint investigation of the matter by the District Attorney of Kings County and the United States Bureau of Narcotics and Dangerous Drugs. He asserts that he informed the B.N.D.D. agent in charge of the investigation concerning the legal requirement that persons monitoring the wire-tap minimize the interception of any conversations not pertinent to the investigation. Special Agent Alexander Dovetko states that he personally visited the Cirillo wire-tap plant almost daily for an

hour or more and personally observed agents and officers turn off the recording and monitoring devices when clearly non-pertinent conversations were being received. He states also that he has examined the logs of the wire-tap and confirmed that a substantial number were turned off when it was determined that they were non-pertinent. He asserts that similar procedure was followed with respect to the Sorrentino wire-tap. A confirmatory affidavit was submitted by an Assistant District Attorney in charge of the Narcotics Bureau of the Kings County District Attorney's office, setting forth that he instructed the police officers who were monitoring the phone conversations that all recording and listening devices were to be turned off completely whenever non-pertinent conversations were intercepted.

This court has reviewed each of the wire-tap orders and the supporting affidavits.

The court has also read the logs of the two wire-taps. The letters "N/P" which frequently appear, clearly refer to "Non-Pertinent" conversations. These were not described in the logs, although it was not recited in many instances that the machine was turned off. A number of conversations could reasonably be interpreted as relating to narcotic transactions; some relate to gambling transactions; and some may not be pertinent to any crime.

Discussion

1. The constitutionality of the wire-tap statute is settled in this circuit and requires no further discussion. *United States* v. *Tortorella*, F. 2d (2d Cir. April 5, 1973).

2. The purpose of requiring a provision for minimization in a wire-tap order is to alert the persons who monitor wire-taps to the necessity of limiting invasions of privacy to those necessary to accomplish their mission. This purpose has been served if in-

vasion of privacy has been minimized, whether the magic word minimization is used in the wire-tap order or not. Justice Shapiro's order limited the interception to conversations relative to the crimes being investigated. Here also the persons monitoring conversations were instructed not to listen to personal conversations, and in fact minimized the interceptions.

The remedy to be imposed for failure to include a minimization clause or failure to minimize is not certain. The Eighth Circuit in *United States* v. *Cox*, 462 F.2d 1293, 1301 (1972), held that failure to minimize did not require suppression, stating:

> Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted.

Chief Judge Matthes held that the remedy provided by Congress for failure to minimize, in addition to suppression of non-incriminating evidence, is a civil suit under 18 U.S.C. § 2520 against the investigating officers for actual, liquidated and punitive damages for exceeding their authority.

The opposite conclusion was reached by Judge Waddy in *United States* v. *Scott*, 331 F.Supp. 233 (D. D.C. 1971), where, after finding a complete failure to minimize interception, he ordered all the wire-tap evidence suppressed.

The Second Circuit in *United States* v. *Bynum*, 475 F.2d 832 (1973), noted both the *Cox* and *Scott* cases, but specifically left open the issue of the appropriate remedy for failure to minimize, pending a more complete record to be developed on remand. A

different panel in the Second Curcuit in *United States* v. *Tortorella, supra,* F.2d cited the *Scott* case for the standards employed to determine whether minimization had been effective. The Court did not discuss the remedy for failure to minimize although it intimated that it would follow the *Scott* case.

The general rule in this circuit with respect to excessive seizures is that the property described in the search warrant is admissible, and only the items improperly seized should be suppressed. *United States* v. *Dzialak,* 441 F.2d 212, 216-17 (2d Cir. 1971); *United States ex rel. Nickens* v. *LaVallee,* 391 F.2d 123 (2d Cir. 1968).

Since even legitimate business conversations frequently begin with personal chit-chat, it is not possible to distinguish every personal conversation from an incriminating one. Moreover, in tracking down a wholesale transaction which takes place only at long intervals, it is necessary to listen to many conversations that may lead up to it, but not be directly pertinent. What is more significant is that the wire-taps produced a number of conversations which may expressly "pertain to the commission of the crime." In effect, defendants ask to suppress incriminatory conversations because nonincriminating conversations may also have been overheard.

Since the court has determined that the monitoring agents did in fact show a proper respect for privacy (see *United States* v. *Tortorella, supra,* slip op. 2688) and that Justice Shapiro's order satisfied the statutory requirements, it is unnecessary to decide what the remedy for failure to minimize should be.

3. The objection to the extension of the orders is without merit, since the statute fixes no limit on the number of extensions. The statute requires only that extensions be based on new applications and new findings by the issuing judge. The affidavits requesting extensions set forth adequate facts and sustain the orders.

4. The argumentative objections to the showing of probable cause and to the showing that other means of investigation were impractical does not require extended analysis. Wire-tap affidavits, like affidavits in support of a search warrant, should be interpreted in a practical manner and not be subject to later "nit-picking." *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 751 (1965).

5. The production of the informant is not necessary, where the affidavits show that there was reason to credit his statements. *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971).

6. A district court should not add to the instances in which a suspect is given immunity from a criminal trial because of the blunder of a law enforcement official.

Minor defects in state court wire-tap orders were held not to be fatal in *United States* v. *Poeta*, 455 F.2d 117 (2d Cir. 1972), and *United States* v. *Tortorello*, F.2d (2d Cir. April 5, 1973).

Multiplication of pretrial hearings is not in the public interest. No material issue has been raised which requires a hearing on defendants' motion.

It is ORDERED that the motion to suppress the wire-tap evidence be denied.

/s/ORRIN G. JUDD
U.S.D.J.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT

IN THE MATTER OF THE APPLICATION

-of-

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN EAVESDROPPING WARRANT PERMITTING THE INTERCEPTION OF COMMUNICATIONS TRANSMITTED OVER TELEPHONE INSTRUMENT

AREA CODE 212 613-8570

EUGENE GOLD, District Attorney of the County of Kings, State of New York, having submitted an application for an Eavesdropping Warrant with respect to communications transmitted over the telephone instrument bearing the number Area Code 212 631-8570.

Upon reading the affidavit of EUGENE GOLD, sworn to the 31st day of October, 1972; the affidavit of DOUGLAS Le VIEN, sworn to the 31st day of October; and it appearing therefrom that there is probable cause to believe that evidence of the commission of the crime of Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, may be obtained by the interception of communications transmitted

over the telephone instrument aforesaid; it is determined on the basis of facts submitted herein that:

There is probable cause to believe that Alfonse C. Circillo, has committed, is committing or is about to commit the crime of Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, by reason of the fact that known conversations concerning the illegal sale of narcotics in Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, had with the confidential informant referred to herein involving discussions concerning price, amount and place of sale were had;

There is probable cause to believe that communications concerning the aforesaid crime will be obtained by the interception of messages transmitted over the said telephone instrument.

Normal investigative procedures have been tried and have failed and it reasonably appears to be unlikely to succeed if tried or to be too dangerous;

There is probable cause to believe that the facilities from which, and the place where, the telephone communications are to be intercepted are being used, or are about to be used, in connection with the commission of the crime of Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, and are commonly used by Alfonse C. Cirillo, whose telephone communications are sought to be intercepted.

All of which shows to my satisfaction that grounds exist for the issuance of an Eavesdropping Warrant to intercept the communications of Alfonse C. Cirillo transmitted over the aforesaid telephone instrument, it is

ORDERED that the District Attorney of Kings County and his duly designated agents be, and they hereby are, authorized and empowered to intercept, listen to, overhear, eavesdrop and

make copies and permanently preserve by mechanical or electronic device the telephone communications of Alfonse C. Cirillo transmitted over the telephone instrument bearing the number Area Code 212 631-8570, located in premises 41-86 Glenwood Street, a one family private house in Little Neck, County of Queens, New York, New York, and listed in the records of the New York Telephone Company in the name of Alfonse Cirillo, and which communications pertain to the commission of the crime hereinabove mentioned and by reason of the fact that the above referred conversations had with a confidential informant and Alfonse C. Cirillo concerning the sale of narcotics in Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, herein mentioned, and by reason of the fact that known conversations concerning the illegal sale of narcotics in Violation of Article 220: Dangerous Drug Offenses, of the Penal Law of the State of New York, had with the confidential informant referred to herein involving discussions concerning price, amount and place of sale were had, and it is further

ORDERED that the District Attorney of Kings County, and his duly designated agents be, and they hereby are, authorized to cut, break, tap and make connection with any and all wires leading to and from the said telephone instrument and to do all things necessary to permit the interception of communications transmitted thereon and for the preservation of such communications by mechanical or electronic devices with authority to make secret entry upon premises in which the aforesaid telephone instrument is located, and to install any eavesdropping device if such entry becomes necessary to execute this Warrant, and it is further

ORDERED that any and all intercepted communications recorded and preserved by the District Attorney of Kings County and his duly designated agents shall not be divulged except in

accordance with law and when not otherwise privileged by law, and it is further

ORDERED the effective date of this Warrant is October 31st, 1972, and shall not automatically terminate when the communication hereinabove described shall have been obtained but said interception shall continue until November 29th, 1972, the maximum number of days permitted by statute and the daily interception while this Warrant shall remain effective shall be for twenty-four (24) hours on each day.

Dated: Brooklyn, New York
October 31st, 1972

Signed
Associate Justice of the
Appellate Division:
Second Department

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

United States of America

v.

No. 73 CR-352

ALPHONSE CIRILLO, also known as "Fuzzy"

On this 30th day of JULY, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Harold Borg, Esq.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C. Secs. 841(a)(1) and T-18, U.S. Code, Sec. 2, in that from on or about and between Dec. 6, 1972 and March 16, 1973, both dates being approximate and inclusive, the defendant, with others, did unlawfully conspire with each other, to distribute and to possess quantities of heroin, A schedule I narcotic drug controlled substance as charged in counts 1, 2, 7 & 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] 14 years, 9 months on counts 1 and 2 to run concurrently plus special parole term of 10 years. Defendant fined $10,000 on count 1; on counts 7 & 9 defendant is sentenced to imprisonment for a period of 10 years pursuant to T-18, U.S. Code, Sec. 4208(a)(2) to run concurrently and to run consecutively with sentence imposed in counts 1 & 2 plus special parole term of 10 years to run concurrently with special parole term imposed in counts 1 and 2. Defendant fined $10,000.00 on count 9.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Orrin G. Judd
United States District Judge.

The Court recommends commitment to[6] a state institution to permit credit for present confinement.

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1. Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." 2. Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. 3. Insert "in count(s) number " if required Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. 5. Enter any order with respect to suspension and probation. 6. For use of Court to recommend a particular institution.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

United States of America

v.

No. 73 CR-352

VINCENT MURPHY a/k/a "Murph"

On this 12th day of October, 1973 came the attorney for the government and the defendant appeared in person and with counsel, S. Laifer, Esq.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C. Secs. 841(a)(1)&T-18, U.S.C. Sec. 2 in that from on or about and between Dec. 6, 1972 and Mar. 16, 1973, the defendant, with others, did unlawfully conspire with each other, to distribute and to possess quantities of heroin, a Schedule I narcotic drug controlled substance as charged in counts 1, 2, 7 & 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to

the custody of the Attorney General or his authorized representative for imprisonment for a period of 10 years to run concurrently on counts 1, 2, 7 & 9 plus a special parole term of 7 years. Defendant fined $5,000 on count 9. Defendant continued on bail pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Orrin G. Judd
United States District Judge.

---

1. Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." 2. Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. 3. Insert "in count(s) number " if required Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. 5. Enter any order with respect to suspension and probation. 6. For use of Court to recommend a particular institution.

Supreme Court, U.S.
FILED
JUN 6 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1837

THEODORE ALFRED LILIENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES T. MCKINNEY
Counsel for Petitioner
401 Broadway
New York, New York 10013

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

THEODORE ALFRED LILIENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Theodore Alfred Lilienthal, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on May 7, 1974.

A

Opinion Below

On May 7, 1974, the petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C

Questions Presented

1. Whether the necessity of the statutory minimization requirement in wiretap warrants or orders shall be strictly construed.

2. Whether the electronic surveillance statutes are unconstitutional in that they violate the right of privacy.

D

Statutes Involved

Title 18, United States Code, Section 2515

Title 18, United States Code, Section 2518(5)

New York State Criminal Procedure Law, Section 700.30(7).

E

Statement of the Case

The petitioner, Theodore Alfred Lilienthal, was tried along wtih seven others for a violation of Title 21, United States Code, Section 846, a narcotics conspiracy. In addition there were substantive counts and Mr. Lilienthal was charged with one count of possession and one count of distribution of heroin. After a trial before a jury the petitioner was convicted of all three counts with which he was charged.

The petitioner was sentenced to concurrent terms of eight years' imprisonment and five years' special parole on all three counts and a $2500 fine on the conspiracy count.

The prosecution below related to the dealings in narcotics which the jury found, orchestrated principally, according to the government's case, by the defendant Alphonse Cirillo.

Although some of the defendants at trial were apprehended with a sizable amount of heroin in their possession, there was no such proof as to the petitioner.

The proof against the petitioner consisted of overheard phone conversations between the petitioner and Alphonse Cirillo, overheard phone conversations between Cirillo and another defendant during which Cirillo mentioned the petitioner, and the observations of agents following the petitioner. Without going into a detailed recitation and factual analysis, it may fairly be stated that without the overheard phone conversations themselves and the light they cast upon the observations by the agents of the petitioner, the proof against the petitioner would be grossly inadequate to sustain a conviction. The petitioner was never seen with any observable heroin, nor did he ever mention heroin directly. The entire case against the petitioner comes to light only with the aid of the overheard phone conversations.

Reasons for Granting the Writ

1. The decision below raises a significant question concerning whether the necessity of the statutory minimization requirement in wiretap warrants or orders shall be strictly construed.

The wiretap warrant below was authorized under Article 700 of the New York State Criminal Procedure Law. That law is virtually a re-enactment of the federal statutes governing electronic surveillance, and, it is submitted, should be construed by the same standards.

Broadly put, the federal statutes place limitations on the use of electronic surveillance. Anything less than strict adherence to the procedural safeguards contained in

the statutes amounts to a Fourth Amendment Constitutional violation. 18 U.S.C. 2515.

One such procedural safeguard is the requirement of 18 U.S.C. 2518(5) that "every order and extention * * * shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception * * *". The same procedural safeguard is embodied in Section 700.30(7) of the New York Criminal Procedure Law.

The original wiretap warrant or order in this case did not contain this procedural safeguard.

The four extensions obtained by the prosecutors did contain this procederal safeguard. However the four extensions depended upon the original order for probable cause, as noted in the opinion below in footnote 3.

The decision below is in part based upon the prosecution argument that although it is true that the warrant contained no such directive, in fact, the two prosecutors involved were aware of the requirement to minimize and so instructed the agents executing the warrant. Affidavits by the prosecutors and agents attesting to this were received by the trial court.

In cases involving electronic surveillance by warrant, the only protection against abuse of authority and undue invasion of privacy is the requirement of a neutral, detached magistrate who will look to see that the procedural safeguards are met.

It is submitted that the procedural requirements of both the federal statutes and the New York statute should be strictly construed. *Gelbard* v. *United States,* 408 U.S. 41 (1972); *Application of the United States for Relief,* 427 F. 2d 639 (9th Cir. 1970); *United States* v. *Scott,* 331 F. Supp. 233 (U.S.D.C., D. C. 1971).

It is further submitted without lengthy argument that the procedural safeguards required by these statutes should not be watered down by after-the-fact supplemental affidavits by the very prosecutors and agents involved in the action, as was the case here. *Whitely* v. *Warden of Wyoming Penitentiary,* 401 U.S. 560 (1971).

This case, involving a New York warrant as it does, would appear to be controlled by the New York statute. *United States* v. *Tortorello,* 480 F. 2d 764 (2nd Cir. 1973).

New York case law on the point seems clear that without an express provision concerning minimization in the order, the interception is invalid as violative of the strict requirements of the Criminal Procedure Law 700.30(7). *People* v. *Pieri,* 69 Misc. 2d 1085, 332 N.Y.S. 2d 786; *People* v. *Holder,* 69 Misc. 2d 863, 331 N.Y.S. 2d 557 (decided upon the prior statute with an identical requirement); *People* v. *Kennedy,* 347 N.Y.S. 2d 327.

Finally, this Court's recent action in *Bynam* v. *United States,* 15 Cr L 4057, seems to indicate that in the sensitive area of electronic surveillance, strict adherence to the procedural safeguards of the governing statutes must be complied with.

To the extent that the opinion below has the effect of lessening the standards of construction in this area of the law, it is submitted that a significant question is raised to which this Court should address itself.

2. The decision below raises a significant question concerning whether the electronic surveillance statutes are unconstitutional in that they violate the right of privacy.

It is submitted that all wiretapping and bugging under statutory authority, whether federal or New York, is violative of the right of privacy under the Fourth and Ninth Amendments to the Federal Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution as it applies to New York, decided opinion to the contrary. *United States* v. *Tortorello,* 480 F. 2d 764 (2nd Cir. 1973).

To date, however, this Court has not definitively ruled on this issue.

Reference is made to Mr. Justice Douglas' concurring opinion in *Gelbard* v. *United States,* 408 U.S. 41 (1972).

Conclusion

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES T. MCKINNEY
Counsel for Petitioner
401 Broadway
New York, New York 10013

Dated: New York, New York

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 676, 677, 684, 688, 730, 762, 763, 796—
September Term, 1973.

(Argued February 14, 1974 Decided May 7, 1974.)

Docket Nos. 73-2426, 73-2615, 73-2554, 73-2796,
73-2555, 73-2644, 73-2645, 73-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIRREZ, THEODORE ALFRED LILIENTHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants-Appellants.

Before:

MEDINA, MANSFIELD and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge,* convicting (1) all appellants of conspiracy to distribute nacotics in violation of 21 U.S.C. §846, (2) Alphonse Cirillo, Vincent Murphy, Robert Venetucci and Theodore Lilienthal of possession of narcotics with intent to distribute in violation of 21 U.S.C. §841, (3) Alphonse Cirillo, Vincent Murphy, Robert Vene-

tucci, and Salvatore Sorrentino of attempting to distribute narcotics in violation of 21 U.S.C. §846, (4) Alphonse Cirillo, Vincent Murphy, Salvatore Sorrentino, and Theodore Lilienthal of distribution of narcotics in violation of 21 U.S.C. §841(a)(1), and (5) Lawrence Cesare of attempting to possess narcotics in violation of 21 U.S.C. §846.

The convictions of Gutierrez and Gaber are reversed. All other convictions are affirmed.

HAROLD BORG, Esq., Kew Gardens, N.Y. (Arnold E. Wallach, Esq., of counsel), *for Appellant Cirillo.*

STEPHEN R. LAIFER, Esq., Brooklyn, N.Y., *for Appellant Murphy.*

IRVING SABLE, Esq., Far Rockaway, N.Y., *for Appellants Sorrentino and Cesare.*

JACOB P. LEFKOWITZ, Esq., New York, N.Y., *for Appellant Venetucci.*

PAUL E. WARBURGH, JR., Esq., New York, N.Y. (Kassner & Detsky, New York, N.Y., of counsel), *for Appellant Gutierrez.*

CHARLES T. MCKINNEY, Esq., New York, N.Y., *for Appellant Lilienthal.*

JULIUS WASSERSTEIN, Esq., Brooklyn, N.Y., *for Appellant Gaber.*

GUY L. HEINEMANN, Assistant United States Attorney (Edward John Boyd, V, United States Attorney for the Eastern District of New York, Raymond J. Dearie, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge*:

On this appeal we encounter a narcotic distribution conspiracy of the familiar "chain type" involving sophisti-

cated suppliers, middlemen and customers who dealt in substantial amounts of heroin, conducting their business through use of coded narcotics trade language or jargon in which innocent phrases were used to describe heroin, prices and parties. After a jury trial before Judge Orrin G. Judd of the Eastern District of New York all appellants were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. §846 (Count 9). Additionally appellants were convicted on other counts as follows:

Counts	*Appellants*[1]
1: (possession with intent to distribute 1 kilogram of heroin)	Cirillo and Murphy
2: (distribution of the same kilogram of heroin)	Cirillo, Murphy and Sorrentino

1. Appellants were sentenced as follows:

Cirillo —14 years, 9 months on Counts 1 and 2 (concurrent) and 10 years special parole; 10 years on Counts 7 and 9 (concurrent but consecutive to sentences on Counts 1 and 2) and 10 years special parole; $10,000 fine on Count 9.

Murphy —10 years on Counts 1, 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Sorrentino —10 years on Counts 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Venetucci —9 years on Counts 3, 4 and 9 (concurrent) and 7 years special parole.

Lilienthal —8 years on Counts 5, 6 and 9 (concurrent) and 5 years special parole; $2,500 fine on Count 9.

Cesare —5 years on Counts 8 and 9 and 5 years special parole.

Gutierrez —5 years on Count 9 and 5 years special parole.

Gaber —5 years on Count 9 and 5 years special parole.

Presently all appellants except Cirillo are free on bail pending decision of their appeal.

Appendix A

Counts	*Appellants*[1]
3 and 4: (possession of the same kilogram with intent to distribute and attempted distribution)	Venetucci
5 and 6: (possession and distribution of ½ kilogram of heroin)	Lilienthal
7: (attempted distribution of the ½ kilogram)	Cirillo, Murphy and Sorrentino
8: (attempt to possess the ½ kilogram)	Cesare

Finding insufficient evidence of guilt, we reverse the convictions of appellants Gutierrez and Gaber. The convictions of all the other appellants are affirmed.

The government's proof consisted largely of tapes and transcripts of some 40 intercepted conversations occurring over the home telephones of Cirillo and Sorrentino, supplemented by testimony of surveilling agents and a video tape of a meeting of four of the conspirators. Initial authorization for the wiretap of Cirillo's phone was given in a warrant order issued on October 31, 1972, by Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate Division, pursuant to New York's eavesdropping statute, N.Y.C.P.L. §§700.05, *et seq.*, after he found on the basis of affidavits submitted by the Kings County District Attorney and a state police detective, that there was probable cause to believe Cirillo was committing narcotics offenses and that evidence of these offenses could be obtained by wiretapping Cirillo's phone. This warrant was extended

for four additional 30-day periods by Justice Rabin of the Appellate Division.

Initial authorization for the wiretap of Sorrentino's phone was given in a warrant issued on January 25, 1973, pursuant to the New York statute by Justice Irwin Brownstein of the New York State Supreme Court, which was extended for two additional 30-day periods.

The evidence, viewed in the light most favorable to the government, reveals the following: At 7:00 A.M. on January 18, 1973, Cirillo called Sorrentino and said he wanted to see Sorrentino and "Bobby" (Venetucci). Later that morning Sorrentino and Venetucci spent two hours at Cirillo's home in Little Neck, New York. Thereafter Sorrentino phoned Cirillo to ask whether he should "take the kid out of school" at around 4:00 P.M., to which Cirillo replied, "No, its figured most likely, like the kids going to school tonight." James Garcia, a detective with the New York City Police Department, testified, on the basis of his extensive experience in narcotics investigations, that he would interpret the "kids going to school" language as narcotics coded vocabulary for delivering narcotics.

As the result of a further phone call Cirillo, carrying a rolled up brown paper bag, a type of unobstrusive container frequently used for transportation of narcotics, and accompanied by Murphy, met at 10:30 P.M. with Sorrentino at the apartment of the latter's mother on West 8th Street where they were joined by Venetucci, who arrived at about 11:30 P.M. and left 15 minutes later. Venetucci drove directly to 120 Bay 14th Street in Brooklyn where he met appellant Frank Gutierrez on the street. Both then spent two hours in Gutierrez's apartment, following which Vene-

tucci returned to West 8th Street and Avenue U, where he was seen arguing on the streets with Sorrentino, Cirillo, and Murphy.

On the next day, January 19, a series of phone conversations between Cirillo and Sorrentino (during one of which "Bobby" Venetucci was present on Sorrentino's end of the wire) revealed that the argument had arisen because of Venetucci's failure to come up with the money for the narcotics that had been delivered to him the night before by Cirillo, Murphy, and Sorrentino. Venetucci had been unable to locate his "partner" who was supposed to make payment. Sorrentino reported to Cirillo that although Venetucci called from "Bay 14th" (Gutierrez's address), the money had not been received. Sorrentino assured Cirillo that he had told "Bobby" (Venetucci) that Cirillo would not take the "thing" back but wanted the agreed price of $30,000. (At that time the market price for a kilogram of 50% pure heroin ranged from $25,000 to $38,000.) In an effort to obtain the purchase price, a meeting was held that night between Cirillo, Murphy, and Sorrentino, followed by a Sorrentino-Venetucci meeting. The upshot was that while "Bobby" (Venetucci) was finally able to reach his partner "Frankie" by telephone, neither "Bobby" nor "Frankie" could produce the money. Meanwhile Sorrentino expressed concern that the "stuff" (narcotics) was still in Venetucci's house.

The efforts to obtain payment of the $30,000 price for the narcotics continued with Cirillo, the supplier, putting pressure on Sorrentino, the middleman, and the latter in turn pressing Venetucci, who supposedly was looking to his "partner" for payment. On the afternoon of January

22, Venetucci went to Grace's Discount Dress Shop on 11th Avenue in Brooklyn, owned by the wife of Gutierrez, and shortly thereafter Gutierrez entered. Two hours later Venetucci left the shop but returned within a half hour when, before reentering, he walked up and down the opposite side of the street in an apparent effort to determine whether he was being followed. Venetucci finally left the shop at 6:00 P.M. and proceeded in his automobile to Staten Island, driving evasively when he spotted surveillance agents behind him.

By January 25, still unpaid, Cirillo and Sorrentino, who were beginning to lose their patience, resolved to give "Bobby" (Venetucci) a "good workout" and then get the "dress off him" (i.e., secure the return of the narcotics). In this they succeeded, for on the evening of January 26 Sorrentino, Murphy, and Cirillo, who was carrying a brown paper bag, all entered Sorrentino's house in Brooklyn. Three days later Venetucci was told by Sorrentino that "they got rid of it for 22" (i.e., sold the narcotics for $22,000), leaving an $8,000 balance, which Venetucci and his partner were expected to pay. Negotiations regarding the $8,000 deficit followed, with Venetucci trying to persuade Cirillo and the "other guy" to absorb half the loss on the understanding that Sorrentino and Venetucci would make up the other half. Cirillo, however, kept insisting that Sorrentino, Venetucci and "Frankie" pay the entire $8,000.

Discouraged but apparently not resolved to abandon their business relationship, Sorrentino and Cirillo, on March 9, 1973, began discussing another transaction. At 5:45 P.M. on that date Sorrentino advised Cirillo by phone

that he had "met some nice people" who thought the "figure" for the "dresses" (i.e., the price for narcotics offered by Cirillo and Sorrentino) was "very good." Several days later, on March 14th, Sorrentino called Cirillo and ordered another "dress" which, according to Detective Garcia, meant another order of narcotics. At this point Cesare, the prospective purchaser, appeared on the scene and asked Sorrentino for delivery of "a sample of that dress." Upon receiving this message from Sorrentino, Cirillo went into action. He called Lilienthal's home and, upon learning that "Ted" (Lilienthal) was not expected home until 7:00 P.M., left a message instructing Ted to bring him back "those income tax forms, the one * * * half filled out * * *" (i.e., a half-kilo of heroin). With a view to making the purchase Cesare, accompanied by Gaber, proceeded to the White Castle parking lot near Sorrentino's home where they waited in vain for 3½ hours for the narcotics to be supplied by Lilienthal and departed only after Sorrentino and Cirillo were unable to locate the supplier (Lilienthal).

On the following day, March 15th, Cirillo reached Lilienthal by phone and in response to his request for the "paper that I half filled out" (half-kilo of narcotics) Lilienthal indicated that he had it. Shortly thereafter Lilienthal visited Cirillo's residence, apparently for the purpose of delivering the half-kilo. Cirillo then called Sorrentino to advise that he and "Murph" would go to Sorrentino's residence. Sorrentino then told Cesare, the prospective customer for the half kilo, to call back some time after 7:30 P.M.

At 7:15 P.M. on March 15th Cirillo and Murphy, intending to rendezvous with Sorrentino for the narcotics delivery, entered the parking lot near Sorrentino's house

where they were promptly arrested by federal narcotics agents and New York police. A search revealed a half kilo of heroin and small quantities of cocaine in their possession. The area was quickly cleared in order not to arouse Sorrentino's suspicions. At 8:00 P.M. Sorrentino informed Cesare by phone that he was still waiting for his "friends" (i.e., Cirillo and Murphy) to get there.

At approximately 10:00 P.M., on March 14th Cesare, the prospective customer, together with Gaber and an individual identified as Jerry Collins, arrived at Sorrentino's house. Cesare and Gaber went inside and exited with Sorrentino at 10:15 P.M. Sorrentino talked with Cesare, Gaber and Collins in the parking lot outside his house for about 45 minutes before he got in his own car and drove around for approximately a half hour. When Sorrentino returned, all four men went to a nearby restaurant until approximately midnight when, after making a call from a nearby public telephone booth, Sorrentino went back into his residence and the other three men drove off in their car. At this point the car driven by Cesare was stopped by a narcotics agent and, when all the occupants were asked to produce identification, Gaber said that they were only in the area to see "Brother." Cesare added, "[Y]eah, Brother Salvatore Sorrentino."

In addition to the tapes and transcripts and the testimony of the surveilling agents, the government introduced the items seized from Cirillo and Murphy on the evening of March 15th, which included the brown paper bag, bag of half kilo of heroin, a small bag of cocaine taken from Cirillo, and a small amount of cocaine wrapped in tin foil that had been taken from Murphy.

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On July 27, 1973, the jury returned a verdict finding all appellants guilty of conspiracy to distribute narcotics and various appellants guilty of narcotic offenses as shown above. However, Gutierrez was found not guilty of attempting to possess narcotics in connection with the January transaction and Gaber was found not guilty of attempting to possess narcotics in connection with the March transaction. We turn to the numerous claims of error asserted on this appeal.

DISCUSSION

Use of Wiretap Evidence

Several appellants challenge the constitutionality of the New York State eavesdrop statute, N.Y.C.P.L. §§700.05, *et seq.* However, the provisions of that statute are authorized by and conform to similar provisions of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, see 18 U.S.C. §§2516(2), 2518 (1970), which we held to be constitutional in *United States* v. *Tortorello,* 480 F.2d 764 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973). See also *United States* v. *Giordano,* 469 F.2d 522 (4th Cir. 1972), *cert. granted,* 411 U.S. 905 (1973). For the reasons stated in *Tortorello* we reject the constitutional claim and turn to the other wiretap issues raised by appellants.

(a) *Validity of Original Wiretap Order*

The first warrant order authorizing a wiretap of Cirillo's home phone, which was issued on October 31, 1972, and broadly authorized interception until November 29, 1972,

of communications of types particularly described, contained no direction that the interception should be conducted "in such a way as to minimize the interception of communications not otherwise subject to eavesdropping," as required by §700.30(7) of the statute, see N.Y.C.P.L. §700.30(1).[2] Several appellants join in Cirillo's argument that the omission of a minimization directive rendered this initial order fatally defective so that any conversations intercepted as a result of it or its subsequent extensions[3] should have been held inadmissible at trial. We disagree.

The first six paragraphs of §700.30 of the state statute limit the scope of an eavesdropping warrant by requiring it to specify, among other things (1) the name of the person, if known, whose communications are to be intercepted, (2) the nature and location of the communications facilities as to which authority to intercept is granted, (3) a particular description of the type of communications sought to be intercepted, (4) a statement of the particular designated offense to which they relate, (5) the identity of the law enforcement agency authorized to intercept the communications, and (6) the period of time during which the inter-

2. Section 700.30 provides:

"An eavesdropping warrant must contain:

* * * * *

"7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; * * *."

3. Since the application for these extensions was based on conversations intercepted as a result of the first order, if the first order were invalid, the subsequent extensions would be "tainted" by the primary illegality.

ception is authorized. Paragraph 7 then provides that the warrant must also contain the above-quoted direction to "minimize" the interception of non-pertinent conversations. Recognizing that paragraph 7 is essentially a summation of "the more specific requirements of 700.30(1)-(6), all of which lead to 'minimization,' " we held in *United States* v. *Manfredi,* Slip Opin. at 5593, 5611-12 (2d Cir. Nov. 23, 1973), that, when the orders and supporting affidavits are construed in "a commonsense and realistic fashion," see *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), mere omission of the "talismanic minimization language" from a wiretap order otherwise in compliance with the statute would not render the warrant invalid under state law, which governs, at least where the supporting affidavits evidenced an actual knowledge of minimization requirement and an agreement to abide by it. See *People* v. *Solomon,* 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973). While here the supporting affidavits contained no specific agreement "to limit the seizure of conversations to those specifically pertaining to the [alleged] Penal Law violations," as the affidavit did in *Manfredi,* there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it.

The investigation of Cirillo was conducted jointly by the District Attorney for Kings County and the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Martin Hershey, the assistant in charge of the Narcotics Bureau in the Kings County District Attorney's Office who directed the investigation, Alexander Dovetko, a special agent with BNDD who supervised the federal agents en-

gaged in the investigation, and Guy Heinemann, the Assistant United States Attorney for the Eastern District who also participated in the joint investigation, all submitted affidavits stating that they were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap, who were ordered to turn off all recording and listening devices whenever they were able to determine that nonpertinent conversations were being intercepted. Agent Dovetko visited the Cirillo wiretap almost daily from its inception and personally observed agents and officers complying with these instructions. Furthermore, during the period covered by the first warrant, the listening and recording of over a quarter of the completed calls was terminated as soon as nonpertinency was determined.[4] These logs, which we have reviewed, support Dovetko's conclusions.[5]

In other contexts New York appellate courts have excused purely technical defects in the form of a search warrant that has been executed according to statutory requirements. Compare *People* v. *Glen*, 30 N.Y.2d 252, 331 N.Y.S. 2d 656, *cert. denied sub nom. Baker* v. *New York*, 409 U.S.

4. The affidavit stated that "[o]f 496 telephone calls made or received, 120 were incomplete (no answer, busy or wrong number). Approximately 287 were listened to completely and approximately 93 were listened to only initially and then turned off when it was determined that they were non-pertinent."

5. Termination for non-pertinency is indicated on the logs by the letters "N/P." Whenever these letters appear, there is no further description of the conversation in the log and the log indicates, by showing that only one or two feet of tape elapsed during that particular interception, that the recording and monitoring devices were shut off as soon as the determination of non-pertinency had been made.

849 (1972) (the "fact that the warrant would on its face authorize an improper search does not undo it for all purposes") with *People* v. *Varney*, 32 App. Div. 2d 181, 301 N.Y.S.2d 330 (1969) (technical defects may be overlooked where search is conducted lawfully). The omission of a minimization directive was a "technical defect" under the circumstances of this case where its absence could not, assuming proper attention to the provisions of the warrant, lead to a greater invasion of privacy than was justified by probable cause. Cf. *Smith* v. *United States*, 360 U.S. 1, 9 (1959) (deficiencies are "technical" where no substantial rights are involved). Since the first order in this case was in "substantial compliance" with the statute we hold that it was valid. Compare *Manfredi, supra*, with *United States* v. *Poeta*, 455 F.2d 117, 121 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) and *United States* v. *Rizzo*, Slip Opin. at 1675 (2d Cir. Feb. 7, 1974).

(b) *Failure to Hold a Minimization Hearing*

Appellants next argue that the district court should not have denied their motions to suppress the wiretap evidence without first holding an evidentiary hearing to determine whether minimization had in fact been achieved during the entire course of the wiretap of the Cirillo and Sorrentino phones. In denying the motions to suppress the district court relied on the Dovetko, Hershey and Heinemann affidavits and on his own review of the logs kept during the Cirillo and Sorrentino wiretaps.

The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed further that at all times the Cirillo and

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Sorrentino wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity."[6] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that

6. The affidavit stated:

"Special Agent Nicholas Alleva and Special Agent William Malarney, have reviewed the logs for both the Cirillo and Sorrentino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be nonpertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time. 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent."

the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the statutory minimization directive. See *United States* v. *Rizzo*, Slip Opin. at 1491-95 (2d Cir. Jan. 17, 1974). Indeed, the prima facie showing is even stronger here than in *Rizzo*, which also upheld a wiretap conducted pursuant to the New York statute. There the state police detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve minimization.[7] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.

(c) *"Expert" Interpretation of Narcotics Jargon*

Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff,"

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7. Even assuming *arguendo* that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization. Compare *United States* v. *Bynum*, 485 F.2d 490, 500-02 (2d Cir. 1973) with *United States* v. *Fino*, 478 F.2d 35 (2d Cir. 1973) and *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir. 1973).

"dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States* v. *Borrone-Iglar,* 468 F.2d 419, 421 (2d Cir.), *cert. denied,* 410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

(d) *"Surprise" Disclosure of Venetucci Conversations*

Venetucci attacks the introduction at trial of two conversations between him and Sorrentino, which were intercepted shortly after the wiretap of Sorrentino's phone had begun on January 29, 1973. The basis for this objection is the failure of the prosecutor, Assistant U.S. Attorney Heinemann, to make any pretrial disclosure that these conversations had been intercepted.

Venetucci alleges that Heinemann represented to him on two occasions that none of the government's tapes or transcripts contained any conversation participated in by Venetucci. The first occasion was on May 17, 1973, when, in response to discovery motions, Heinemann agreed to furnish not only the wiretap orders with their supporting

affidavits but also those transcripts of tapes that had actually been compiled, and to make all tapes and logs available for listening and inspection. Although Heinemann is alleged to have stated on that date that none of the government's tapes contained any Venetucci conversations, Heinemann did not recall having made any such statement. Before trial Heinemann, after stating that he expected all "of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel," furnished to Venetucci's counsel approximately 90 transcripts of tape recorded conversations, none of which contained any Venetucci conversations. The second occasion occurred after the trial had begun on July 9 when Venetucci's counsel moved for a mistrial on the ground that Heinemann had implied in his opening statement to the jury that the government actually did have tapes of Venetucci's conversations which would incriminate him.[8] However, responding to the court's inquiry as to whether he meant to refer to wiretaps of Venetucci conversations, Heinemann had said "No, I don't think there is anything I said to indicate that."

Heinemann did not disclose that tapes of Venetucci conversations existed until the fifth day of appellants' trial when he informed the court that he had discovered the tapes

8. In moving for a mistrial, counsel for Venetucci referred to Heinemann's statement that:

> "Later it became clear exactly how much money was to be paid for the heroin that was brought to Sorrentino's mother's house that night (i.e. January 18). $30,000. And $10,000 was ultimately the payment that was demanded, Bobby Venetucci, as a sign of his good faith. This we know because the defendants talked about it on the telephone, and the telephone of Alphonse Cirillo during January, 1973, was under electronic surveillance by court order."

on the previous evening in reviewing the logs kept during the Sorrentino wiretap. Heinemann subsequently offered, and the district court admitted, the transcripts and tapes of two conversations between Sorrentino and Venetucci which occurred on January 29, 1973 and on February 1, 1973, respectively, concerning their joint obligation to make up to Cirillo the $8,000 deficit resulting from the sale of the first lot of narcotics at $22,000 instead of the $30,000 which Venetucci was to pay for it. Venetucci argues that he was prejudiced by this delayed "bombshell" because (1) he was denied any opportunity to participate in a pretrial suppression motion and (2) his counsel was misled in the preparation of his own opening statement, where he emphasized that, despite the government's extensive electronic surveillance, no Venetucci conversation had been intercepted.

We agree with Venetucci that the government should have produced the transcripts of his conversations with Sorrentino prior to trial in response to his explicit discovery requests, see *United States* v. *Crisona,* 416 F.2d 107 (2d Cir. 1969), *cert. denied* 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations.

At least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel. Our review of these

logs reveals that identification of each caller is neither difficult nor particularly time consuming. In each instance where a call was intercepted the log entry identified the parties (where identifiable) before giving a brief description of the conversation. Indeed, on the very third page of the Sorrentino logs there is a log entry, highlighted by two asterisks, which reads, "MO *Bobby,* MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on. . . ."[9] (emphasis added). All counsel were at all times aware that "Bobby" and "Brother" were the nicknames for Venetucci and Sorrentino, respectively.

Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probable knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity of the wiretap orders or on the conduct of the wiretap operation[10] borders on the frivolous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did

9. "MO Bobby, MI Brother" is shorthand for Male/Out (i.e., male calling from outside) to Male/In (i.e., male inside receiving call).

10. Venetucci asserts that his arguments against the wiretap would have been entirely different from those actually raised by the other defendants. He says he would have focused on the New York rather than the federal legislation (although the New York legislation was clearly authorized and conformed to the federal legislation), on the existence of probable cause for the first order (rather than its form) and the numerous extensions of the first order. We have considered these arguments but find them insufficient to change our already-expressed views.

the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States* v. *Allsenberrie,* 424 F.2d 1209, 1215 (7th Cir. 1970); *Pierce* v. *United States,* 414 F.2d 163, 169 (5th Cir.), *cert. denied,* 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States* v. *Padrone,* 406 F.2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Sufficiency of the Evidence

Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of *non*-hearsay evidence that the latter was a party to the conspiracy. See *Glasser* v. *United States,* 315 U.S. 60, 74 (1942); *United States* v. *Geaney,* 417 F.2d 1116 (2d Cir.), *cert. denied sub nom. Lynch* v. *United States,* 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See *Flintkote Co.* v. *Lysfjord,* 246 F.2d 368, 387 (9th Cir.), *cert. denied,* 355

U.S. 835 (1957). While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial, see *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964) ("mere meeting was no evidence [that persons were] conspirators") and *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) with *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

As to most defendants this threshold requirement as to admissibility of hearsay declarations of co-conspirators was clearly met. The tapes, transcripts, surveillance, and other circumstantial evidence provided overwhelming non-hearsay evidence of a conspiracy to distribute heroin in which Cirillo and Murphy were suppliers, Sorrentino was a middleman, and Venetucci and Cesare were customers. Lilienthal, Gutierrez and Gaber argue, however, that there was insufficient non-hearsay evidence to permit the trial court to find by a fair preponderance of the evidence, which is the governing standard, that they had intended to participate in either the January or March transactions. Therefore, they say, it was reversible error to permit the jury to consider the incriminating hearsay declarations of the other co-defendants as evidence against them.

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(a) *Lilienthal*

The non-hearsay evidence of Lilienthal's participation in the March transaction was clearly sufficient to permit the introduction of statements by co-conspirators in furtherance of the conspiracy. The principal item was Lilienthal's devastatingly incriminatory telephone conversation with Cirillo on March 15 in which Cirillo asked "I got to—I got to have it before the income tax is filled out. You got the paper that I half filled out?" (i.e., have you got the half kilo of heroin?), to which Lilienthal responded "Oh yeah, yeah, yeah," and advised Cirillo that he would stop by in about an hour. In a short while Lilienthal left his residence and later in the day his car was seen at Cirillo's house. Shortly after Lilienthal's visit to Cirillo's house, Cirillo and Murphy went to the White Castle parking lot near Sorrentino's house where they had failed to appear on the previous night because Cirillo had been unable to communicate to Lilienthal his request for those "half filled out" income tax forms (i.e., the half kilo of heroin). When they arrived at the parking lot Cirillo and Murphy were arrested and a package containing a half kilo of heroin was discovered on Cirillo.

From this non-hearsay evidence, including Lilienthal's own statements and conduct, the jury could infer that he agreed to and did supply to Cirillo the half kilo of heroin needed for sale in the chain of distribution. The court acted properly, therefore, in admitting hearsay statements of co-conspirators made in furtherance of the conspiracy, including Cirillo's "statement to Sorrentino" during the aborted January transaction that "Teddy" (Lilienthal) was

a supplier who was always a "million percent, nothing ever goes wrong" and another statement by Cirillo to Sorrentino before the March transaction to the effect that "my friend Ted [has] got some papers for you," (i.e., some heroin). These statements confirmed the non-hearsay evidence surrounding the meeting and warranted the jury's finding beyond a reasonable doubt that Lilienthal was a member of the conspiracy and a participant in the March transaction. See *United States* v. *Manfredi*, —— F.2d —— (2d Cir. Nov. 23, 1973), Slip Opin. 5593; *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

(b) *Gutierrez*

Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators. The only independent non-hearsay evidence of Gutierrez's possible participation in the conspiracy related to the aborted January, 1973, transaction. On January 18th Venetucci, immediately after leaving his rendezvous with Cirillo, Murphy and Sorrentino at Sorrentino's mother's apartment, for two hours visited Gutierrez's home. At the conclusion of that meeting Venetucci drove back to rejoin Cirillo, Murphy and Sorrentino. On January 22nd Venetucci visited with Gutierrez for four hours at the dress store of the latter's wife, with an interruption when Venetucci left and then returned only after checking for surveillance. Venetucci finally departed, driving evasively to Staten Island. There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of nar-

cotics by Gutierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the court to find by a fair preponderance that he had participated.

While the two visits raise suspicion, suspicion is not enough. For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits. Relying on *United States* v. *Manfredi, supra,* the government contends that in addition to Venetucci's visits there was circumstantial evidence in the form of "verbal acts" by Sorrentino that showed Gutierrez's participation in the conspiracy. It is true that in several Sorrentino-Cirillo telephone conversations Sorrentino referred to "Frankie" Venetucci's "partner." But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible. Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof.

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Although *Manfredi* went quite far in admitting "verbal acts" of a co-conspirator, it is clearly distinguishable from the present case and cannot be expanded to admit Sorrentino's hearsay statements. In *Manfredi* the statements were those of the defendant Joseph LaCosa regarding *his own personal relations* with Manfredi as a narcotics supplier and could be coupled with his own evasive personal conduct upon the occasion of his visits to Manfredi's home. We treated LaCosa's statements as circumstantial evidence because they represented the declarant's *personal knowledge.* When added to the other corroboratory circumstances we concluded that they had a "ring of reliability." Compare *Manfredi* with *United States* v. *D'Amato,* —— F.2d —— (2d Cir. March 14, 1974), Slip Opin. 2199, 2205-08. No such "ring of reliability" exists here. In the first place the statements relied upon by the government are not those of Venetucci with respect to his personal dealings with Gutierrez, which might conceivably fit within *Manfredi,* but statements of Sorrentino, who had no personal relationship at all with Gutierrez. For all we know Sorrentino may have been basing his description of Gutierrez as Venetucci's "partner" on rumors that he had heard from persons other than Venetucci. To admit such rank "double hearsay" as "circumstantial evidence" or "verbal acts" would be to make a mockery of the "non-hearsay" threshold requirement.

The danger inherent in permitting such hearsay to be used as the basis for admitting still more hearsay declarations of co-conspirators is rather obvious. Aside from the lack of opportunity to cross-examine the declarant and the obvious second-hand nature of Sorrentino's statements,

out-of-court statements by Venetucci himself were introduced which suggested that Gutierrez had not agreed to participate in the narcotics scheme. Thus, in a conversation with Sorrentino on February 1, 1973, with respect to obtaining a loan to make up the $8,000 deficit in the price ultimately secured by Cirillo for the narcotics which Venetucci had agreed to buy, Venetucci expressly denied any understanding that "Frankie" was to share in payment of the deficit.

It may be that the "non-hearsay" threshold requirement for admission of hearsay declarations of co-conspirators, which had been liberalized through a series of modifications since its inception, compare *United States* v. *Nardone,* 127 F.2d 521, 523 (2d Cir.), *cert. denied,* 316 U.S. 698 (1942), and *United States* v. *Pugliese,* 153 F.2d 497, 500 (2d Cir. 1945), with *United States* v. *Geaney, supra,* will be relaxed even further to permit introduction of certain statements of co-conspirators regardless of their unavailability for cross-examination, subject to condition that will be deemed sufficient to guarantee their trustworthiness. See Proposed Rules of Evidence for the United States District Courts and Magistrates, Rules 803(1)-(2). Until such a change is made, however, we must adhere to the standing rule which requires us to exclude hearsay where the threshold test has not been made.

Since the proof of Sorrentino's statements as to the reasons for Venetucci's visit to Gutierrez was inadmissible as evidence of Gutierrez's participation, the trial court could not properly consider it in applying the "fair preponderance" test with respect to Gutierrez. Cf. *Dutton* v. *Evans,* 400 U.S. 74, 88 (1970); *General Tire of Miami*

Beach, Inc. v. *NLRB*, 332 F.2d 58, 61 (5th Cir. 1964). In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt. See *United States* v. *Fantuzzi*, 463 F.2d 683, 689-90 (2d Cir. 1972); *United States* v. *Cimino*, 321 F.2d 509-10 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964); *United States* v. *Bentvena*, 319 F.2d 916, 949 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied sub nom. Lassa* v. *United States*, 361 U.S. 863 (1959). See also *United States* v. *Glover*, 306 F.2d 594 (10th Cir. 1962).

(c) *Gaber*

The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned,

without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test.[11] See *United States* v. *Fantuzzi, supra; United States* v. *Cimino, supra,* and other decisions cited on page 3316.

The decisions relied upon by the government do not support its argument that there was sufficient non-hearsay evidence of Gaber's membership in the conspiracy to admit the hearsay declarations of alleged co-conspirators. In *United States* v. *Calabro,* 449 F.2d 885 (2d Cir.), *cert. denied,* 404 U.S. 1047 (1971), in affirming a narcotics conviction, we regarded "of critical importance" the fact that the defendant, who had been present at several meetings between the seller and the intended customer, an undercover agent, carefully scrutinized the agent and at one point actually frisked him.[12] And in *United States* v. *Ragland,* 375 F.2d 471, 473 (2d Cir. 1967), we upheld the admission of hearsay evidence against a defendant only after noting that a co-defendant had not only used the "slanguage" of narcotics dealings *in the defendant's presence* but had also explicitly referred to "narcotics." Compare *Calabro* and *Ragland* with *Ong Way Jong* v. *United States,* 245 F.2d 392 (9th Cir. 1957) (conviction reversed although defendant was constantly with co-defendant who sold narcotics); *Glover* v. *United States,* 306 F.2d 594 (10th Cir. 1962) (conviction reversed although defendant seen in vicinity of nar-

11. Cesare's statement in one of his March 14 telephone conversations with Sorrentino to the effect that he (Cesare) had "Gabe" (Gaber) with him added nothing to the government's proof of guilty knowledge on the part of Gaber.

12. It was not actually clear from the evidence that the defendant himself frisked the undercover agent. The frisking occurred when the agent was standing at the urinal in a restaurant's men's room as the defendant and his colleague passed behind him.

cotics transaction between co-defendant and undercover agent) and *People* v. *Garcia*, 201 Cal. App. 2d 589, 20 Cal. Reptr. 242 (1962) (conviction reversed although defendant present at time of narcotics sale).

Since the government failed to adduce sufficient non-hearsay evidence of Gaber's participation in the conspiracy, his conviction must be reversed.

Variance Between Proof and Indictment

Venetucci, Lilienthal and Cesare[13] advance the argument, frequently asserted in conspiracy cases, see *United States* v. *Borelli*, 336 F.2d 376, 380 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), that even assuming the involvement of each in one of the two transactions, the evidence showed two independent conspiracies, one in January and the other in March, 1973, rather than the single on-going conspiracy alleged. The issue turns on whether the proof warranted an inference that each of the three, in dealing with a member of the core group (Cirillo, Murphy and Sorrentino), was aware of, and thus knowingly furthered, the core group's overall ongoing venture or partnership. See *Borelli, supra* at 385. Although a single transaction with, or function performed for, a representative of the core group may under some circumstances be insufficient to warrant an inference of knowledge of the extensive nature of the core group's activities, see *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v.

13. Gutierrez and Gaber also complain of a variance as to them but we need not consider these claims since we have already concluded that the evidence was insufficient to connect them with either the January or March transaction.

Stromberg, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), we have recognized that it is "not an arbitrary rule which is to be applied rigidly and without reason." See *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Indeed, just recently we said that "it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

We are not here confronted, however, with merely a single delivery or purchase on the part of each of these three appellants (Venetucci, Lilienthal and Cesare) which, without more, might not support knowledge of a broader conspiracy, see, e.g., *United States* v. *DeNoia, supra*, but with deeper involvement on the part of each of these participants. Venetucci met on at least two occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

In the cases of Lilienthal and Cesare the evidence shows, in addition to their participation in a transaction involving

a large quantity, that they used narcotics code language in their dealings, Lilienthal making a delivery of a half kilo in response to Cirillo's request for "half-filled out" income tax papers and Cesare negotiating for the "sample of the dress." From these circumstances, including their use of pre-arranged code language, the jury could infer knowledge that they were participating in a continuing major business which extended in scope beyond the particular transaction and depended for its success upon a chain of distribution in which each principal played an essential part. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967).

Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States*, 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that "[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence . . . as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators." In *Blumenthal* v. *United States*, 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a similar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.

Appendix A

Miscellaneous Other Points

(a) *The Contents of the Paper Bag*

Sorrentino argues that his conviction on Count 2 (distribution of one kilogram of heroin on January 18, 1973) must be reversed since the government offered no direct proof that the paper bag carried by Cirillo to the meeting with Murphy, Sorrentino and Venetucci at Sorrentino's mother's apartment on the evening of January 18 contained heroin. We disagree. There was ample circumstantial evidence that the bag contained heroin. The delivery of the bag was the result of Sorrentino-Cirillo telephone negotiations in narcotics jargon and was followed by angry discussions regarding Venetucci's failure to deliver the "thirty," (e.g., $30,000), the approximate going price for a 50% pure kilogram of heroin. Later Cirillo and Sorrentino agreed to get the "dress" (i.e., narcotics) off Venetucci.

(b) *The Introduction of the Cocaine Found on Murphy and Cirillo*

Appellants Murphy and Cirillo argue that the trial court should not have permitted the government to introduce the small quantities of cocaine found on them at the time of their arrest (in addition to the half kilogram of heroin found on Cirillo) since it was evidence of crimes other than those charged in the indictment. But here the cocaine was relevant to refute the position which the government could anticipate and which counsel for Cirillo actually tried to establish during cross-examination of government witnesses, i.e., that the heroin was planted on Cirillo as a

frame-up by the arresting officers. See *United States* v. *Purin,* 486 F.2d 1363, 1367 (2d Cir. 1973); *United States* v. *Wright,* 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied,* 410 U.S. 916 (1973). In any event admission of the cocaine as evidence of guilty knowledge on the part of Cirillo and Murphy was well within the trial court's wide discretion. See *United States* v. *Deaton,* 381 F.2d 114, 117-19 (2d Cir. 1967).

(c) *The Jury Charge*

During his charge to the jury the trial judge instructed that they should consider the wiretap evidence since he had determined that the wiretap orders were properly issued. "If I am wrong," he continued, "somebody else can reverse me, but you are bound to take my view of the law." Appellants Murphy and Cirillo argue that this statement, to which they excepted, impermissibly tended to establish a similar train of thought in the minds of the jurors—i.e., if they should render an erroneous verdict, someone else would reverse them. The unnecessary remark is confusing and conceivably could be interpreted several ways. However, even accepting the interpretation given to it by appellants, we are satisfied that under the circumstances of this case it was clearly harmless, in view of the overwhelming evidence against Murphy and Cirillo, including the tapes, visual surveillance and arrest with a large quantity of narcotics in their possession.

Conclusion

The convictions of appellants Gutierrez and Gaber are reversed. All other convictions are affirmed.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

Appeal from the United States District Court for the Eastern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are reversed as to appellants Francisco Gutierrez and Abe Gaber, but as to all other appellants said judgments be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk

APPENDIX C

Statutes Involved

Title 18, United States Code, Section 2515

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

Title 18, United States Code, Section 2518

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approvel of interceptions of, wire or oral communications

involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral

communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a mini-

mum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued intercep-

tion. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated

as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent ju-

risdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the

motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L.90-351, Title III, §802, June 19, 1968, 82 Stat. 218.

New York Criminal Procedure Law, Section 700.30

§700.30. Eavesdropping warrants; form and content

An eavesdropping warrant must contain:

1. The name of the applicant, date of issuance, and the subscription and title of the issuing justice; and

2. The identity of the person, if known, whose communications are to be intercepted; and

3. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

4. A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates; and

5. The identity of the law enforcement agency authorized to intercept the communications; and

6. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and

7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; and

8. An express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant.

L.1970, c. 996, §1, eff. Sept. 1, 1971.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1859

SALVATORE SORRENTINO and
LAWRENCE JOHN CESARE
Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Constitution:

Fourth Amendment 2
Fifth Amendment 2
Sixth Amendment 2

Other Authorities:

NYCPL § 700.10(2) 2
NYCPL § 700.30(7) 3, 4, 6, 7, 8

1968 U.S. Code Cong. & Admin. News 2153, 2192 9

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

SALVATORE SORRENTINO and
LAWRENCE JOHN CESARE

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit affirming petitioners' convictions is unreported and is set out in the Appendix, *infra*, at pp. 1a-31a.

Jurisdiction

The Judgment of the United States Court of Appeals for the Second Circuit affirming petitioners' convictions was entered on May 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the failure to include the statutorily mandated "minimization" provision in the judicial order authorizing the wiretapping of petitioners' conversations requires reversal?

2. Whether the courts below erred in denying petitioners an adversary type suppression hearing on the question of electronic surveillance?

3. Whether the courts below erred in allowing the admission of opinion evidence allegedly interpreting overheard conversations?

Constitutional Provisions and Statutes Involved

This case involves the Fourth, Fifth and Sixth Amendments to the United States Constitution; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, [18 U.S.C. §§ 2510-2520]; and Article 700 of the New York Criminal Procedure Law.

Statement of the Case

On October 31, 1972, based upon affidavits submitted by the District Attorney of Kings County, New York State, and Detective Douglas Le Vien of the New York State Police, a Justice of the Appellate Division of the Supreme Court of the State of New York issued a warrant, pursuant to applicable provisions of Article 700 of the New York Criminal Procedure Law (hereinafter referred to as the "NYCPL"), authorizing the interception of telephone conversations over the home telephone of one Alphonse Cirillo for a period not to exceed thirty days. See NYCPL § 700.10(2). This warrant was later to be extended for four additional thirty day periods (4a). In the course of

this one-hundred fifty days of electronic surveillance, it is conceded that one thousand four hundred ninety-six (1496) telephone calls were, in one form or another, monitored by the law enforcement agents operating the Cirillo wiretap "plant" (14a). Conversations of petitioner Sorrentino and Cirillo were overheard (5a).

On the basis of some of these interceptions of Cirillo and Sorrentino's telephone conversations, an additional wiretap authorization for the interception of conversations over the home telephone of Sorrentino was issued on January 25, 1973 (5a). The tap on Sorrentino's phone was later extended for two additional thirty-day periods (5a). During the ninety days of electronic surveillance over his phone, two thousand one hundred eighty-four (2184) telephone calls were, in part or in whole, intercepted (14a); some of them with petitioner Cesare (7a).

It is further conceded (10a) that neither the order authorizing the interception of conversations over Cirillo's telephone nor the underlying affidavit, contained any provision requiring the "minimization" of such interceptions, despite the fact that NYCPL § 700.30(7) (11a) required such an order to contain

> A provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article. . . . (10a).

The conversations of petitioner Sorrentino which were intercepted on the Cirillo tap between the date of its commencement in November 1972 and the date of the application for the installation on Sorrentino's telephone in January 1973, occurred for the most part, in mid-January 1973, and, in addition to having been played for the jury at the trial below, were also used as evidence supporting a demonstration of probable cause for the issuance of the eavsedropping order on Sorrentino's phone in January 1973 (5a). Petitioner Cesare was intercepted on the Sorrentino tap (7a).

The intercepted conversations eventually introduced at the trial were found to portray a narcotics distribution conspiracy in which petitioner allegedly held the role of middleman between Cirillo—the alleged source of supply—and certain purchasers, who were also indicted of which Cesare was one (7a).

Prior to the commencement of the trial, petitioners moved for a hearing on the question of whether the evidence derived from the interceptions of their conversations should be suppressed, *inter alia*, on the grounds that there existed a fatal failure of minimization as required by both NYCPL § 700.30(7) and portions of the Omnibus Crime Control and Safe Streets Act of 1968 [see 18 U.S.C. § 2518(5)] (13a). Rather than grant such a hearing, the District Court merely relied upon three affidavits submitted by the prosecuting United States Attorney, a Special Agent of the Bureau of Narcotics and Dangerous Drugs and the Assistant District Attorney in charge of the Narcotics Bureau of the Kings County District Attorney's Office, which averred various secondhand, hearsay declarations that minimization had been achieved. E.g., the affidavit of the BNDD agent, primarily relied upon by the court below (14a), stated that he had spoken with two *other* agents who had,

> . . . reviewed the logs for both the Cirillo and Sorrentino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper

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* The indictment below contained nine counts and named eight defendants. Sorrentino was convicted on two substantive counts relating to the distribution and attempted distribution of a kilogram and a half kilogram of heroin, respectively, and on a conspiracy count. He was sentenced to a ten-year term of imprisonment to be followed by a seven-year period of special parole. Sorrentino was also fined $5,000 on the conspiracy count (3a). Cesare was convicted of the attempted possession of the half kilogram and conspiracy. He received a five-year sentence and a five-year special parole term.

> minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be non-pertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be nonpertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time. 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent" (14a).

These affidavits were also interpreted by the courts below to show that these law enforcement officers "were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap. . . ." (12a). From this the court below concluded,

> The omission of a minimization directive was a "technical defect" under the circumstances of this case. . . . (13a),

and further, that

> The affidavits [in opposition to the motion] disclose in detail a clear awareness of and adherence to the minimization requirement (13a).

Forty conversations of the 1,526 fully overheard on the combined Cirillo-Sorrentino taps, were eventually offered into evidence at the trial (4a).

REASONS FOR GRANTING THE WRIT

I.

The failure to provide the statutorily mandated minimization requirement in the first Cirillo order requires reversal.

Both Title III of the Ominbus Crime Control Act of 1968 and the New York Criminal Procedure Law require that an *order* authorizing electronic interception contain a "minimization" clause. 18 U.S.C. § 2518(5);[1] NYCPL § 700.30(7). It is conceded that the first Cirillo order, which authorized interceptions from October 31, 1972 to November 29, 1972, did not contain this mandated directive (10a).

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[1] The provisions of 18 U.S.C. § 2518 are applicable to the states. *People* v. *Holder*, 69 Misc. 2d 863, 331 N.Y.S. 2d 557 (Nassau Co. 1972). See also, *People* v. *Castania*, 73 Misc. 2d 166, 340 N.Y.S. 2d 829 (Monroe Co. 1973); *People* v. *Kennedy*, 75 Misc. 2d 10, 347 N.Y.S. 2d 327 (Greene Co. 1973); *People* v. *Sturgis*, 76 Misc. 2d 1053, 352 N.Y.S. 2d 942 (Sup. Ct. N.Y. Co. 1973); *People* v. *Lowe*, — Misc. 2d —, — N.Y.S. 2d —, N.Y.L.J. 5/7/74, p. 19, col. 4 (Sup. Ct. N.Y. Co.); also see, *Johnson* v. *State*, 226 Ga. 805, 177 S.E. 2d 699 (1970); *Markham* v. *Markham*, — Fla. —, 272 So. 2d 813 (1973); *State* v. *Siegel*, — Md. —, 292 A. 2d 86 (1972); *Cross* v. *State*, — Ga. —, 171 S.E. 2d 507 (1971).

Petitioner Sorrentino's voice was first intercepted on the Cirillo tap on November 12, 1972 (Ap. App. 75),[2] and this interception was to support the applications for orders authorizing electronic surveillance of Sorrentino's own phone, as well as extensions of the Cirillo tap. Petitioner Cesare's conversations were later intercepted over the Sorrentino tap (7a).

As this Court's recent decision in *United States* v. *Giordano*, — U.S. —, 15 Cr. L. Rep. 3033 (May 13, 1974), makes clear, the provisions of Title III impose,

> . . . important preconditions to obtaining any intercept authority at all. Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint . . . These procedures were not to be routinely employed as the initial step in criminal investigation. 15 Cr. L. Rep. at 3036.

Similarly, the provisions of the New York minimization statute, NYCPL § 700.30(7), are "not merely directory but [are] mandatory." *People* v. *Holder*, *infra*, 331 N.Y.S. 2d at 568.[3]

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[2] All references "Ap. App." refer to the appendix of petitioner's co-appellant below, Cirillo, which contains the wiretap orders.

[3] It has been held that the omission of the minimization direction in the warrant can be neutralized by the recognition of such an obligation in the affidavit submitted in support of the warrant's issuance. See, *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973). In this case however it was found that "the supporting affidavits contained no specific agreement 'to limit the seizure of conversations. . . .' as the affidavit did in *Manfredi*" (11a). Conversely, this is a stronger case than *United States* v. *Bynum*, 475 F.2d 832, *on remand*, 360 F. Supp. 400, *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated*, — U.S. —, No. 73-856 (May 28,

[Footnote continued on following page]

Despite these unequivocal pronouncements, the court below, relying on two wholly inapposite state court decisions, held that the failure of the first Cirillo order, from which all others stemmed, to comport with the requirement of NYCPL § 700.30(7) and therefore 18 U.S.C. § 2518(5), was merely a "technical defect" (13a).

Petitioner submits that the defect present in the Cirillo order was as fundamental and as "jurisdictional" as the defect present in *United States* v. *Giordano, supra.* See, *United States* v. *Scott,* 331 F. Supp. 233 (D.D.C. 1971); *United States* v. *Focarile,* 340 F. Supp. 1033, 1044-1050 (D. Md. 1972), *aff'd,* 469 F.2d 522 (4th Cir.), *aff'd on other grounds sub nom, United States* v. *Giordano, supra; United States* v. *Leta,* 332 F. Supp. 1357 (M.D. Pa. 1971); *United States* v. *King,* 335 F. Supp. 523 (S.D. Calif. 1971).

In *Giordano, supra,* this Court construed the provisions of 18 U.S.C. § 2516(1), to prohibit the delegation to an executive assistant of the Attorney General's statutory responsibility personally, to authorize eavesdropping applications. There the Government argued to this Court, as the Court below ruled in this case, that the statutory requirement was merely technical and any breach thereof equally as technical. This Court rejected that view and held instead that the statutory prohibition against delegation was mandated by legislative enactment that could not be transgressed under the rubric of technicalities. In doing so, Mr. Justice White, writing for the Court, viewed the various subsections of § 2518 as comprising the backbone of Title III—including the minimization subsection § 2518 (5). See *Giordano,* 15 Cr. L. Rep. at 3036. The minimiza-

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1974), in which the minimization provision, while having been omitted from an extension order, was contained in the initial authorization order. The court there held that the extension order "incorporates by reference the minimization language of the first order." 475 F.2d at 835. Here, of course, the damaging conversations were in part intercepted under the initial order which, unlike *Bynum, contained* no minimization provision. Minimization directives were only later added to the applications for extensions.

tion requirements of § 2518(5), which are tracked by the New York Statute, can be said to play no less a "central role" in the statutory scheme of Title III. See also, 1968 U.S. Code Cong. & Admin. News 2153, 2192.

In *United States* v. *George*, 465 F.2d 772 (6th Cir. 1972), the court was faced with a similar situation. There the wiretap order provided that the interception of conversations was to be conducted only when FBI visual surveillance indicated that the defendants were within the described premises and also that electronic interception was to be continued only when it was determined by voice recognition that the defendants were using a described pay telephone. The monitoring agents were never given a copy of the order but were simply told by an Assistant United States Attorney that the wiretapping had been authorized; they therefore turned on the recording equipment whenever the telephone was picked up. In reversing George's conviction the Court observed,

> . . . because of the failure to furnish a copy of the authorization order to the officers monitoring the calls the protective limitations of the order were completely defeated. If the agents of the Government are not required to comply with the limitations contained in an order authorizing interceptions of telephone calls then the purpose of such order would be defeated and the only limitation of the officers and the provisions of Title 18 U.S.C. §2518(4) would be a nullity. Obviously this was not the intent of the Congress at the time the statute was enacted. 465 F.2d at 775.

Here the omission of the minimization provision from the primary order was the functional equivalent of the failure to supply the order in *George*.

The interception here of over two thousand conversations, *prima facie*, belied any attempt at minimization. Furthermore, this Court has repeatedly recognized that the validity

of a warrant is to be determined at the time of its issuance and not on the basis of a retrospective judicial supposition as to the warrant's execution:

> . . . this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime *and voluntarily confined their activities to the least intrusive means consistent with that end.*" Katz, supra, at 356-357 19 L Ed 2d at 585. The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. John M. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 ABAJ 943-944 (1963). The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions." (Emphasis added.) *United States* v. *United States District Court,* 407 U.S. 297, 317-318 (1972) (footnotes omitted).

The omission of the minimization provision from the seminal order in this case violated the clear mandate of both Title III and the New York statute. It is the type of statutory flaw recently condemned in *Giordano, supra,* and one to which this Court should not give imprimatur. If continuous disregard for the mandates of both state and federal legislation which seek to "minimize" the dangers originally delineated by this Court in *Berger* v. *New York,* 388 U.S. 41 (1967) is permitted, this legislative protection will become a nullity.

Certiorari should be granted and the decision below reversed.

II.

The refusal of the courts below to afford petitioner an adversary hearing on the question of minimization requires reversal.

Prior to trial petitioner moved for a hearing on the question of whether the statutory minimization requirement had been achieved. See, e.g., *United States* v. *Bynum*, 475 F.2d 832 (2d Cir. 1973); *Abramson* v. *Mitchell*, 459 F.2d 955 (8th Cir. 1972).

In *Alderman* v. *United States*, 394 U.S. 165 (1969) this Court, while reiterating the long-standing rule that evidence obtained by illegal means and the fruits of such evidence must be suppressed,[4] recognized the need for a full adversary hearing to determine whether evidence had, in fact, been illegally seized or tainted by a prior illegal seizure:

> "Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by those records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable." 394 U.S. at 183-184.

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[4] See also, *Benanti* v. *United States*, 355 U.S. 96 (1957) holding the fruits of an unlawful state tap inadmissible in a federal criminal proceeding.

Notwithstanding this directive in *Alderman* of the need for adversary suppression hearings on electronic surveillance questions, the trial court accepted for consideration three affidavits of prosecuting and law enforcement officials which purported to demonstrate that the statutorily-required minimization requirements had been partially achieved (13a). It then denied petitioner a hearing. This procedure was upheld by the court below.

The procedure followed below is no less constitutionally offensive than the government's "trust us to do the right thing" argument which was roundly rejected by this Court in *United States* v. *United States District Court,* 407 U.S. 297 (1972).

In *Nardone* v. *United States,* 308 U.S. 338, 341 (1939), this Court first spelled out the allocations of the burdens of proof between the parties, which should be demonstrated in order to invoke or deny invocation of an exclusionary rule:

> Under this allocation of the burdens of proof, the "burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed." *Id.* Once this is established, the "trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was the fruit of the poisonous tree." *Id.* Finally, if the defendant has come forward with this evidence, the government must "convince the trial court that its proof had an independent origin." *Id.* The government has the ultimate burden of persuasion. *Alderman* v. *United States,* 394 U.S. at 174.

United States v. *Maggadino,* — F.2d —, No. 73-1933 (2d Cir. May 2, 1974) p. 3111, slip opinion.

The court below determined that petitioner had not fulfilled his burden of going forward in the first instance (14a) and was therefore not entitled to a hearing in light of the "Dovetko affidavit" (13a) which, the court below held, established "a prima facie showing of compliance with the statutory minimization directive" (14a).

Such a ruling ignores the sound reasoning underlying the *Alderman* decision. As Chief Judge Kaufman, speaking for a different panel of the Second Circuit, has observed:

> "The teaching of the Supreme Court in Alderman v. United States, *supra*, cannot be avoided . . . it is the adversary system, not representations by the government and not in camera decisions by the court which must be relied upon to determine whether overheard matter is 'relevant'. . . . ." *United States* v. *Huss*, 482 F.2d 38, 50 (1973).

Furthermore, the failure of the primary Cirillo order to include any minimization directive, when coupled with the information supplied in the affidavit itself, shows *prima facie*, that no minimization was achieved.

Taking the terms of the affidavit in the light most favorable to the government, it shows that one thousand five hundred twenty-six (1526) conversations were completely intercepted (14a). Yet only forty of these were offered at trial (4a). Thus, government agents intercepted one thousand four hundred eighty-six (1486) conversations which the prosecutors did not see fit to use. Thirty times as many unusable conversations as usable ones were thus intercepted. On its face the government's affidavits supplied petitioner's threshold showing of a lack of minimization.

As for the diligence of petitioner's counsel on appeal (14a), the government should not be heard to urge upon this Court, as it did to the court below, that petitioner

failed to examine the logs or listen to the tapes when neither the logs nor tapes were completely available until June 15, 1973 and argument on the right to a minimization hearing *had already taken place,* on June 3, 1973. Judge Judd's memorandum and order denying the hearing was filed June 27, 1973. (See pp. 9-10, Brief for United States in the court below). Such a schedule, it is respectfully submitted, was hardly an "ample opportunity" (14a). Cf. *United States* v. *Coplon,* 185 F.2d 629, 638 (2d Cir. 1950). As another panel of the Second Circuit has aptly observed:

> "To compel a party who objects to the use of evidence obtained as a result of unlawful wiretapping to go forward with a showing of taint [citations omitted] and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law." *Huss, supra,* 482 F.2d at 47.

It was error to deny petitioner a minimization hearing and certiorari should be granted and the decision below reversed as to this ground.

III.

The court below erred in affirming the trial court's ruling which allowed expert testimony allegedly interpreting overheard conversations.

There has arisen within the Second Circuit an evidentiary rule unique to narcotics cases. Specifically, when a police officer of sufficient experience in the narcotics law enforcement field is qualified as an expert he is then permitted to interpret the conversations overheard as reflecting a "narcotics code." *United States* v. *Manfredi,* 488 F.2d 588, 597 (2d Cir. 1973). See, e.g., *United States* v. *Borrone-Iglar,* 468 F.2d 419, 421 (2d Cir.), *cert. den.,* 410 U.S. 927 (1972).

This method of proof is highly prejudicial, calling as it does for testimony regarding the operation of another's mind and upon which proof, and little else, a defendant may be found to be "an active participant in the conspiracy." *United States* v. *Sisca*, — F.2d —, No. 73-2017 (2d Cir. May 10, 1974) p. 3425, slip opinion.

It is noteworthy that petitioner Cesare was convicted only of conspiracy and an alleged attempted possession of one-half a kilogram of heroin.

At the trial below a New York City Police Detective, whose expertise in the field of narcotics law enforcement is not here questioned, testified that terms such as "kids going to school" (5a), "dresses" (15a) "those income tax forms, the one . . . half filled out. . . ." (15a),[5] were, in fact, conversations regarding narcotics (15a).

Petitioners contend that this was gross error since the officer's testimony could amount to no more than his conclusion of "the meaning of familiar words of fixed definition in the vernacular [and accordingly] cannot be proved by testimony of such a skilled witness." C.J.S. § 546(74) p. 296 (1964 ed.). *Wisconsin Alumni Research Foundation* v. *Breon*, 85 F.2d 166, 171 (8th Cir.), *cert. denied*, 299 U.S. 598 (1936). A witness cannot be asked to testify regarding the "subjective conclusion about [another's] intention" in the choice of certain words. *United States* v. *Jansen*, 475 F.2d 312, 317 (7th Cir. 1973). That the witness is an expert makes no difference.

In *People* v. *Tassell*, 272 App. Div. 710, 74 N.Y.S. 2d 524 (1st Dept. 1947) the court ruled that in a bookmaking prosecution the admission of testimony of a police officer,

[5] It is noteworthy that of the appellants below some had children (App. Ap. 346), one owned a dress manufacturing business (6a) and presumably they filed income tax returns as required by law.

expert in bookmaking cases, as to his conclusions regarding the occupation of the bookmaker's runner, based upon his overhearing of the defendant's conversations, was error. The court held:

> "This witness was permitted to state his own conclusion concerning the occupation of some undisclosed person presumably at the other end of the telephone. Even as an expert the arresting officer should not have been allowed to give speculative hearsay testimony as to what players and bookmakers might do or say in their dealings with each other. Nor should he have been permitted to draw his own conclusion that the defendant was a bookmaker's runner based on the meaning he attributed to the defendant's speech. His testimony in this last regard constituted an opinion by the officer with respect to the main issue on which the ultimate question of the defendant's guilt or innocence rested in this case. This issue was to be decided by the court on the evidence, and not on the opinion of the witness concerning the defendant's activities and what they signified to him." 74 N.Y.S. 2d at 525-526.

Accordingly, the admission of Detective Garcia's interpretive testimony was error.[6]

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[6] Should certiorari be granted petitioners reserve for argument on the merits the legality (1) of the trial judge's comment to the jury that if he were in error in admitting the wiretap testimony "somebody else can reverse me" (31a); and (2) whether the proof at trial showed two separate conspiracies of which the proof as to petitioner Cesare showed, if anything, his participation only in the second. See, e.g., *United States* v. *Bless*, 422 F.2d 210, 212 (2d Cir. 1970).

CONCLUSION

For all of the foregoing reasons, certiorari should be granted and the judgments below reversed.

Respectfully submitted,

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APPENDIX A - OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 676, 677, 684, 688, 730, 762, 763, 796—
September Term, 1973.

(Argued February 14, 1974 Decided May 7, 1974.)

Docket Nos. 73-2426, 73-2615, 73-2554, 73-2796,
73-2555, 73-2644, 73-2645, 73-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILIENTHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants-Appellants.

Before:

MEDINA, MANSFIELD and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge,* convicting (1) all appellants of conspiracy to distribute narcotics in violation of 21 U.S.C. §846, (2) Alphonse Cirillo, Vincent Murphy, Robert Venetucci and Theodore Lilienthal of possession of narcotics with intent to distribute in violation of 21 U.S.C. §841, (3) Alphonse Cirillo, Vincent Murphy, Robert Venetucci, and Salvatore Sorrentino of attempting to distribute

narcotics in violation of 21 U.S.C. §846, (4) Alphonse Cirillo, Vincent Murphy, Salvatore Sorrentino, and Theodore Lilienthal of distribution of narcotics in violation of 21 U.S.C. §841(a)(1), and (5) Lawrence Cesare of attempting to possess narcotics in violation of 21 U.S.C. §846.

The convictions of Gutierrez and Gaber are reversed. All other convictions are affirmed.

HAROLD BORG, Esq., Kew Gardens, N.Y. (Arnold E. Wallach, Esq., of counsel), *for Appellant Cirillo.*

STEPHEN R. LAIFER, Esq., Brooklyn, N.Y., *for Appellant Murphy.*

IRVING SABLE, Esq., Far Rockaway, N.Y., *for Appellants Sorrentino and Cesare.*

JACOB P. LEFKOWITZ, Esq., New York, N.Y., *for Appellant Venetucci.*

PAUL E. WARBURGH, JR., Esq., New York, N.Y. (Kassner & Detsky, New York, N.Y., of counsel), *for Appellant Gutierrez.*

CHARLES T. MCKINNEY, Esq., New York, N.Y., *for Appellant Lilienthal.*

JULIUS WASSERSTEIN, Esq., Brooklyn, N.Y., *for Appellant Gaber.*

GUY L. HEINEMANN, Assistant United States Attorney (Edward John Boyd, V, United States Attorney for the Eastern District of New York, Raymond J. Dearie, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

On this appeal we encounter a narcotic distribution conspiracy of the familiar "chain type" involving sophisticated suppliers, middlemen and customers who dealt in substantial amounts of heroin, conducting their business through use of coded narcotics trade language or jargon in which innocent phrases were used to describe heroin, prices and parties. After a jury trial before Judge Orrin G. Judd of the Eastern District of New York all appellants were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. §846 (Count 9). Additionally appellants were convicted on other counts as follows:

Counts	*Appellants*[1]
1: (possession with intent to distribute 1 kilogram of heroin)	Cirillo and Murphy
2: (distribution of the same kilogram of heroin)	Cirillo, Murphy and Sorrentino

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1 Appellants were sentenced as follows:

Cirillo —14 years, 9 months on Counts 1 and 2 (concurrent) and 10 years special parole; 10 years on Counts 7 and 9 (concurrent but consecutive to sentences on Counts 1 and 2) and 10 years special parole; $10,000 fine on Count 9.

Murphy —10 years on Counts 1, 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Sorrentino—10 years on Counts 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Venetucci —9 years on Counts 3, 4 and 9 (concurrent) and 7 years special parole.

Lilienthal —8 years on Counts 5, 6 and 9 (concurrent) and 5 years special parole; $2,500 fine on Count 9.

Cesare —5 years on Counts 8 and 9 and 5 years special parole.

Gutierrez —5 years on Count 9 and 5 years special parole.

Gaber —5 years on Count 9 and 5 years special parole.

Presently all appellants except Cirillo are free on bail pending decision of their appeal.

Counts	*Appellants*[1]
3 and 4: (possession of the same kilogram with intent to distribute and attempted distribution)	Venetucci
5 and 6: (possession and distribution of ½ kilogram of heroin)	Lilienthal
7: (attempted distribution of the ½ kilogram)	Cirillo, Murphy and Sorrentino
8: (attempt to possess the ½ kilogram)	Cesare

Finding insufficient evidence of guilt, we reverse the convictions of appellants Gutierrez and Gaber. The convictions of all the other appellants are affirmed.

The government's proof consisted largely of tapes and transcripts of some 40 intercepted conversations occurring over the home telephones of Cirillo and Sorrentino, supplemented by testimony of surveilling agents and a video tape of a meeting of four of the conspirators. Initial authorization for the wiretap of Cirillo's phone was given in a warrant order issued on October 31, 1972, by Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate Division, pursuant to New York's eavesdropping statute, N.Y.C.P.L. §§700.05, *et seq.*, after he found on the basis of affidavits submitted by the Kings County District Attorney and a state police detective, that there was probable cause to believe Cirillo was committing narcotics offenses and that evidence of these offenses could be obtained by wiretapping Cirillo's phone. This warrant was extended for four additional 30-day periods by Justice Rabin of the Appellate Division.

Initial authorization for the wiretap of Sorrentino's phone was given in a warrant issued on January 25, 1973, pursuant to the New York statute by Justice Irwin Brownstein of the New York State Supreme Court, which was extended for two additional 30-day periods.

The evidence, viewed in the light most favorable to the government, reveals the following: At 7:00 A.M. on January 18, 1973, Cirillo called Sorrentino and said he wanted to see Sorrentino and "Bobby" (Venetucci). Later that morning Sorrentino and Venetucci spent two hours at Cirillo's home in Little Neck, New York. Thereafter Sorrentino phoned Cirillo to ask whether he should "take the kid out of school" at around 4:00 P.M., to which Cirillo replied, "No, its figured most likely, like the kids going to school tonight." James Garcia, a detective with the New York City Police Department, testified, on the basis of his extensive experience in narcotics investigations, that he would interpret the "kids going to school" language as narcotics coded vocabulary for delivering narcotics.

As the result of a further phone call Cirillo, carrying a rolled up brown paper bag, a type of unobstrusive container frequently used for transportation of narcotics, and accompanied by Murphy, met at 10:30 P.M. with Sorrentino at the apartment of the latter's mother on West 8th Street where they were joined by Venetucci, who arrived at about 11:30 P.M. and left 15 minutes later. Venetucci drove directly to 120 Bay 14th Street in Brooklyn where he met appellant Frank Gutierrez on the street. Both then spent two hours in Gutierrez's apartment, following which Venetucci returned to West 8th Street and Avenue U, where he was seen arguing on the street with Sorrentino, Cirillo, and Murphy.

On the next day, January 19, a series of phone conversations between Cirillo and Sorrentino (during one of which

"Bobby" Venetucci was present on Sorrentino's end of the wire) revealed that the argument had arisen because of Venetucci's failure to come up with the money for the narcotics that had been delivered to him the night before by Cirillo, Murphy, and Sorrentino. Venetucci had been unable to locate his "partner" who was supposed to make payment. Sorrentino reported to Cirillo that although Venetucci called from "Bay 14th" (Gutierrez's address), the money had not been received. Sorrentino assured Cirillo that he had told "Bobby" (Venetucci) that Cirillo would not take the "thing" back but wanted the agreed price of $30,000. (At that time the market price for a kilogram of 50% pure heroin ranged from $25,000 to $38,000.) In an effort to obtain the purchase price, a meeting was held that night between Cirillo, Murphy, and Sorrentino, followed by a Sorrentino-Venetucci meeting. The upshot was that while "Bobby" (Venetucci) was finally able to reach his partner "Frankie" by telephone, neither "Bobby" nor "Frankie" could produce the money. Meanwhile Sorrentino expressed concern that the "stuff" (narcotics) was still in Venetucci's house.

The efforts to obtain payment of the $30,000 price for the narcotics continued with Cirillo, the supplier, putting pressure on Sorrentino, the middleman, and the latter in turn pressing Venetucci, who supposedly was looking to his "partner" for payment. On the afternoon of January 22, Venetucci went to Grace's Discount Dress Shop on 11th Avenue in Brooklyn, owned by the wife of Gutierrez, and shortly thereafter Gutierrez entered. Two hours later Venetucci left the shop but returned within a half hour when, before reentering, he walked up and down the opposite side of the street in an apparent effort to determine whether he was being followed. Venetucci finally left the shop at 6:00 P.M. and proceeded in his automobile to Staten

Island, driving evasively when he spotted surveillance agents behind him.

By January 25, still unpaid, Cirillo and Sorrentino, who were beginning to lose their patience, resolved to give "Bobby" (Venetucci) a "good workout" and then get the "dress off him" (i.e., secure the return of the narcotics). In this they succeeded, for on the evening of January 26 Sorrentino, Murphy, and Cirillo, who was carrying a brown paper bag, all entered Sorrentino's house in Brooklyn. Three days later Venetucci was told by Sorrentino that "they got rid of it for 22" (i.e., sold the narcotics for $22,000), leaving an $8,000 balance, which Venetucci and his partner were expected to pay. Negotiations regarding the $8,000 deficit followed, with Venetucci trying to persuade Cirillo and the "other guy" to absorb half the loss on the understanding that Sorrentino and Venetucci would make up the other half. Cirillo, however, kept insisting that Sorrentino, Venetucci and "Frankie" pay the entire $8,000.

Discouraged but apparently not resolved to abandon their business relationship, Sorrentino and Cirillo, on March 9, 1973, began discussing another transaction. At 5:45 P.M. on that date Sorrentino advised Cirillo by phone that he had "met some nice people" who thought the "figure" for the "dresses" (i.e., the price for narcotics offered by Cirillo and Sorrentino) was "very good." Several days later, on March 14th, Sorrentino called Cirillo and ordered another "dress" which, according to Detective Garcia, meant another order of narcotics. At this point Cesare, the prospective purchaser, appeared on the scene and asked Sorrentino for delivery of "a sample of that dress." Upon receiving this message from Sorrentino, Cirillo went into action. He called Lilienthal's home and, upon learning that "Ted" (Lilienthal) was not expected home until 7:00 P.M., left a message instructing Ted to bring him back "those in-

come tax forms, the one . . . half filled out . . ." (i.e., a half-kilo of heroin). With a view to making the purchase Cesare, accompanied by Gaber, proceeded to the White Castle parking lot near Sorrentino's home where they waited in vain for 3½ hours for the narcotics to be supplied by Lilienthal and departed only after Sorrentino and Cirillo were unable to locate the supplier (Lilienthal).

On the following day, March 15th, Cirillo reached Lilienthal by phone and in response to his request for the "paper that I half filled out" (half-kilo of narcotics) Lilienthal indicated that he had it. Shortly thereafter Lilienthal visited Cirillo's residence, apparently for the purpose of delivering the half-kilo. Cirillo then called Sorrentino to advise that he and "Murph" would go to Sorrentino's residence. Sorrentino then told Cesare, the prospective customer for the half kilo, to call back some time after 7:30 P.M.

At 7:15 P.M. on March 15th Cirillo and Murphy, intending to rendezvous with Sorrentino for the narcotics delivery, entered the parking lot near Sorrentino's house where they were promptly arrested by federal narcotics agents and New York police. A search revealed a half kilo of heroin and small quantities of cocaine in their possession. The area was quickly cleared in order not to arouse Sorrentino's suspicions. At 8:00 P.M. Sorrentino informed Cesare by phone that he was still waiting for his "friends" (i.e., Cirillo and Murphy) to get there.

At approximately 10:00 P.M. on March 14th Cesare, the prospective customer, together with Gaber and an individual identified as Jerry Collins, arrived at Sorrentino's house. Cesare and Gaber went inside and exited with Sorrentino at 10:15 P.M. Sorrentino talked with Cesare, Gaber and Collins in the parking lot outside his house for about 45 minutes before he got in his own car and drove around for approximately a half hour. When Sorrentino returned, all four men went to a nearby restaurant

until approximately midnight when, after making a call from a nearby public telephone booth, Sorrentino went back into his residence and the other three men drove off in their car. At this point the car driven by Cesare was stopped by a narcotics agent and, when all the occupants were asked to produce identification, Gaber said that they were only in the area to see "Brother." Cesare added, "[Y]eah, Brother Salvatore Sorrentino."

In addition to the tapes and transcripts and the testimony of the surveilling agents, the government introduced the items seized from Cirillo and Murphy on the evening of March 15th, which included the brown paper bag, bag of half kilo of heroin, a small bag of cocaine taken from Cirillo, and a small amount of cocaine wrapped in tin foil that had been taken from Murphy.

On July 27, 1973, the jury returned a verdict finding all appellants guilty of conspiracy to distribute narcotics and various appellants guilty of narcotic offenses as shown above. However, Gutierrez was found not guilty of attempting to possess narcotics in connection with the January transaction and Gaber was found not guilty of attempting to possess narcotics in connection with the March transaction. We turn to the numerous claims of error asserted on this appeal.

Discussion

Use of Wiretap Evidence

Several appellants challenge the constitutionality of the New York State eavesdrop statute, N.Y.C.P.L. §§700.05, *et seq.* However, the provisions of that statute are authorized by and conform to similar provisions of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, see 18 U.S.C. §§2516(2), 2518 (1970), which we held to be constitutional in *United*

States v. *Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). See also *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411 U.S. 905 (1973). For the reasons stated in *Tortorello* we reject the constitutional claim and turn to the other wiretap issues raised by appellants.

(a) *Validity of Original Wiretap Order*

The first warrant order authorizing a wiretap of Cirillo's home phone, which was issued on October 31, 1972, and broadly authorized interception until November 29, 1972, of communications of types particularly described, contained no direction that the interception should be conducted "in such a way as to minimize the interception of communications not otherwise subject to eavesdropping," as required by §700.30(7) of the statute, see N.Y.C.P.L. §700.30(7).[2] Several appellants join in Cirillo's argument that the omission of a minimization directive rendered this initial order fatally defective so that any conversations intercepted as a result of it or its subsequent extensions[3] should have been held inadmissible at trial. We disagree.

The first six paragraphs of §700.30 of the state statute limit the scope of an eavesdropping warrant by requiring it to specify, among other things (1) the name of the per-

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2 Section 700.30 provides:

"An eavesdropping warrant must contain:

* * * * *

"7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; . . . ."

3 Since the application for these extensions was based on conversations intercepted as a result of the first order, if the first order were invalid, the subsequent extensions would be "tainted" by the primary illegality.

son, if known, whose communications are to be intercepted, (2) the nature and location of the communications facilities as to which authority to intercept is granted, (3) a particular description of the type of communications sought to be intercepted, (4) a statement of the particular designated offense to which they relate, (5) the identity of the law enforcement agency authorized to intercept the communications, and (6) the period of time during which the interception is authorized. Paragraph 7 then provides that the warrant must also contain the above-quoted direction to "minimize" the interception of non-pertinent conversations. Recognizing that paragraph 7 is essentially a summation of "the more specific requirements of 700.30(1)-(6), all of which lead to 'minimization,'" we held in *United States* v. *Manfredi*, Slip Opin. at 5593, 5611-12 (2d Cir. Nov. 23, 1973), that, when the orders and supporting affidavits are construed in "a commonsense and realistic fashion," see *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965), mere omission of the "talismanic minimization language" from a wiretap order otherwise in compliance with the statute would not render the warrant invalid under state law, which governs, at least where the supporting affidavits evidenced an actual knowledge of the minimization requirement and an agreement to abide by it. See *People* v. *Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973). While here the supporting affidavits contained no specific agreement "to limit the seizure of conversations to those specifically pertaining to the [alleged] Penal Law violations," as the affidavit did in *Manfredi*, there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it.

The investigation of Cirillo was conducted jointly by the District Attorney for Kings County and the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Mar-

tin Hershey, the assistant in charge of the Narcotics Bureau in the King's County District Attorney's Office who directed the investigation, Alexander Dovetko, a special agent with BNDD who supervised the federal agents engaged in the investigation, and Guy Heinemann, the Assistant United States Attorney for the Eastern District who also participated in the joint investigation, all submitted affidavits stating that they were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap, who were ordered to turn off all recording and listening devices whenever they were able to determine that nonpertinent conversations were being intercepted. Agent Dovetko visited the Cirillo wiretap almost daily from its inception and personally observed agents and officers complying with these instructions. Furthermore, during the period covered by the first warrant, the listening and recording of over a quarter of the completed calls was terminated as soon as nonpertinency was determined.[4] These logs, which we have reviewed, support Dovetko's conclusions.[5]

In other contexts New York appellate courts have excused purely technical defects in the form of a search warrant that has been executed according to statutory requirements. Compare *People* v. *Glen*, 30 N.Y.2d 252, 331 N.Y.S.2d 656, *cert. denied sub nom. Baker* v. *New York*, 409 U.S. 849

4 The affidavit stated that "[o]f 496 telephone calls made or received, 120 were incomplete (no answer, busy or wrong number). Approximately 287 were listened to completely and approximately 93 were listened to only initially and then turned off when it was determined that they were non-pertinent."

5 Termination for non-pertinency is indicated on the logs by the letters "N/P." Whenever these letters appear, there is no further description of the conversation in the log and the log indicates, by showing that only one or two feet of tape elapsed during that particular interception, that the recording and monitoring devices were shut off as soon as the determination of non-pertinency had been made.

(1972) (the "fact that the warrant would on its face authorize an improper search does not undo it for all purposes") with *People* v. *Varney*, 32 App. Div. 2d 181, 301 N.Y.S.2d 330 (1969) (technical defects may be overlooked where search is conducted lawfully). The omission of a minimization directive was a "technical defect" under the circumstances of this case where its absence could not, assuming proper attention to the provisions of the warrant, lead to a greater invasion of privacy than was justified by probable cause. Cf. *Smith* v. *United States*, 360 U.S. 1, 9 (1959) (deficiencies are "technical" where no substantial rights are involved). Since the first order in this case was in "substantial compliance" with the statute we hold that it was valid. Compare *Manfredi, supra*, with *United States* v. *Poeta*, 455 F.2d 117, 121 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) and *United States* v. *Rizzo*, Slip Opin. at 1675 (2d Cir. Feb. 7, 1974).

b) *Failure to Hold a Minimization Hearing*

Appellants next argue that the district court should not have denied their motions to suppress the wiretap evidence without first holding an evidentiary hearing to determine whether minimization had in fact been achieved during the entire course of the wiretap of the Cirillo and Sorrentino phones. In denying the motions to suppress the district court relied on the Dovetko, Hershey and Heinemann affidavits and on his own review of the logs kept during the Cirillo and Sorrentino wiretaps.

The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed further that at all times the Cirillo and Sorrentino wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and

officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity."[6] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the statutory minimization directive. See *United States* v. *Rizzo*, Slip Opin. at 1491-95 (2d Cir. Jan. 17, 1974). Indeed, the prima facie showing is even stronger here than in *Rizzo*, which also upheld a wiretap conducted pursuant to the New York statute. There the state police

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6 The affidavit stated:

"Special Agent Nicholas Alleva and Special Agent William Malarney, have reviewed the logs for both the Cirillo and Sorrentino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be nonpertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time. 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent."

detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve minimization.[7] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.

(c) *"Expert" Interpretation of Narcotics Jargon*

Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States* v. *Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir.), *cert. denied*,

7 Even assuming *arguendo* that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization. Compare *United States* v. *Bynum*, 485 F.2d 490, 500-02 (2d Cir. 1973) with *United States* v. *Fino*, 478 F.2d 35 (2d Cir. 1973) and *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir. 1973).

410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

(d) *"Surprise" Disclosure of Venetucci Conversations*

Venetucci attacks the introduction at trial of two conversations between him and Sorrentino, which were intercepted shortly after the wiretap of Sorrentino's phone had begun on January 29, 1973. The basis for this objection is the failure of the prosecutor, Assistant U.S. Attorney Heinemann, to make any pretrial disclosure that these conversations had been intercepted.

Venetucci alleges that Heinemann represented to him on two occasions that none of the government's tapes or transcripts contained any conversation participated in by Venetucci. The first occasion was on May 17, 1973, when, in response to discovery motions, Heinemann agreed to furnish not only the wiretap orders with their supporting affidavits but also those transcripts of tapes that had actually been compiled, and to make all tapes and logs available for listening and inspection. Although Heinemann is alleged to have stated on that date that none of the government's tapes contained any Venetucci conversations, Heinemann did not recall having made any such statement. Before trial Heinemann, after stating that he expected all "of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel,' furnished to Venetucci's counsel approximately 90 transcripts of tape recorded conversations, none of which contained any Venetucci conversations. The second occasion occurred after the trial had begun on July 9 when Venetucci's counsel moved for a mistrial on the ground that Heinemann had implied in his opening statement to

the jury that the government actually did have tapes of Venetucci's conversations which would incriminate him.[8] However, responding to the court's inquiry as to whether he meant to refer to wiretaps of Venetucci conversations, Heinemann had said "No, I don't think there is anything I said to indicate that."

Heinemann did not disclose that tapes of Venetucci conversations existed until the fifth day of appellants' trial when he informed the court that he had discovered the tapes on the previous evening in reviewing the logs kept during the Sorrentino wiretap. Heinemann subsequently offered, and the district court admitted, the transcripts and tapes of two conversations between Sorrentino and Venetucci which occurred on January 29, 1973 and on February 1, 1973, respectively, concerning their joint obligation to make up to Cirillo the $8,000 deficit resulting from the sale of the first lot of narcotics at $22,000 instead of the $30,000 which Venetucci was to pay for it. Venetucci argues that he was prejudiced by this delayed "bombshell" because (1) he was denied any opportunity to participate in a pretrial suppression motion and (2) his counsel was misled in the preparation of his own opening statement, where he emphasized that, despite the government's extensive electronic surveillance, no Venetucci conversation had been intercepted.

We agree with Venuetucci that the government should have produced the transcripts of his conversations with

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8 In moving for a mistrial, counsel for Venetucci referred to Heinemann's statement that:

> "Later it became clear exactly how much money was to be paid for the heroin that was brought to Sorrentino's mother's house that night (i.e. January 18). $30,000. And $10,000 was ultimately the payment that was demanded, Bobby Venetucci, as a sign of his good faith. This we know because the defendants talked about it on the telephone, and the telephone of Alphonse Cirillo during January, 1973, was under electronic surveillance by court order."

Sorrentino prior to trial in response to his explicit discovery requests, see *United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approxiately 200, contained any Venetucci conversations.

At least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel. Our review of these logs reveals that identification of each caller is neither difficult nor particularly time consuming. In each instance where a call was intercepted the log entry identified the parties (where identifiable) before giving a brief description of the conversation. Indeed, on the very third page of the Sorrentino logs there is a log entry, highlighted by two asterisks, which reads, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on. . . ." [9] (emphasis added). All counsel were at all times aware that "Bobby" and "Brother" were the nicknames for Venetucci and Sorrentino, respectively.

Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity

9 "MO Bobby, MI Brother" is shorthand for Male/Out (i.e., male calling from outside) to Male/In (i.e., male inside receiving call).

of the wiretap orders or on the conduct of the wiretap operation[10] borders on the frivolous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States* v. *Allsenberrie*, 424 F.2d 1209, 1215 (7th Cir. 1970); *Pierce* v. *United States*, 414 F.2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States* v. *Padrone*, 406 F.2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Sufficiency of the Evidence

Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of *non*-hearsay evidence that the latter was a party to the conspiracy. See *Glasser* v. *United States*, 315 U.S. 60, 74

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10 Venetucci asserts that his arguments against the wiretap would have been entirely different from those actually raised by the other defendants. He says he would have focused on the New York rather than the federal legislation (although the New York legislation was clearly authorized and conformed to the federal legislation), on the existence of probable cause for the first order (rather than its form) and the numerous extensions of the first order. We have considered these arguments but find them insufficient to change our already-expressed views.

(1942); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 387 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial, see *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964) ("mere meeting was no evidence [that persons were] conspirators") and *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) with *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

As to most defendants this threshold requirement as to admissibility of hearsay declarations of co-conspirators was clearly met. The tapes, transcripts, surveillance, and other circumstantial evidence provided overwhelming non-hearsay evidence of a conspiracy to distribute heroin in which Cirillo and Murphy were suppliers, Sorrentino was a middleman, and Venetucci and Cesare were customers. Lilienthal, Gutierrez and Gaber argue, however, that there was insufficient non-hearsay evidence to permit the trial court to find by a fair preponderance of the evidence, which is the governing standard, that they had intended to participate in either the January or March transactions. Therefore, they say, it was reversible error to permit the jury to consider the incriminating hearsay declarations of the other co-defendants as evidence against them.

(a) *Lilienthal*

The non-hearsay evidence of Lilienthal's participation in the March transaction was clearly sufficient to permit the introduction of statements by co-conspirators in furtherance of the conspiracy. The principal item was Lilienthal's devastatingly incriminatory telephone conversation with Cirillo on March 15 in which Cirillo asked "I got to—I got to have it before the income tax is filled out. You got the paper that I half filled out?" (i.e., have you got the half kilo of heroin?), to which Lilienthal responded "Oh yeah, yeah, yeah," and advised Cirillo that he would stop by in about an hour. In a short while Lilienthal left his residence and later in the day his car was seen at Cirillo's house. Shortly after Lilienthal's visit to Cirillo's house, Cirillo and Murphy went to the White Castle parking lot near Sorrentino's house where they had failed to appear on the previous night because Cirillo had been unable to communicate to Lilienthal his request for those "half filled out" income tax forms (i.e., the half kilo of heroin). When they arrived at the parking lot Cirillo and Murphy were arrested and a package containing a half kilo of heroin was discovered on Cirillo.

From this non-hearsay evidence, including Lilienthal's own statements and conduct, the jury could infer that he agreed to and did supply to Cirillo the half kilo of heroin needed for sale in the chain of distribution. The court acted properly, therefore, in admitting hearsay statements of co-conspirators made in furtherance of the conspiracy, including Cirillo's "statement to Sorrentino" during the aborted January transaction that "Teddy" (Lilienthal) was a supplier who was always a "million percent, nothing ever goes wrong" and another statement by Cirillo to Sorrentino before the March transaction to the effect that "my friend Ted [has] got some papers for you," (i.e., some heroin).

These statements confirmed the non-hearsay evidence surrounding the meeting and warranted the jury's finding beyond a reasonable doubt that Lilienthal was a member of the conspiracy and a participant in the March transaction. See *United States* v. *Manfredi*, —— F.2d —— (2d Cir. Nov. 23, 1973), Slip Opin. 5593; *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

(b) *Gutierrez*

Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators. The only independent non-hearsay evidence of Gutierrez's possible participation in the conspiracy related to the aborted January, 1973, transaction. On January 18th Venetucci, immediately after leaving his rendezvous with Cirillo, Murphy and Sorrentino at Sorrentino's mother's apartment, for two hours visited Gutierrez's home. At the conclusion of that meeting Venetucci drove back to rejoin Cirillo, Murphy and Sorrentino. On January 22nd Venetucci visited with Gutierrez for four hours at the dress store of the latter's wife, with an interruption when Venetucci left and then returned only after checking for surveillance. Venetucci finally departed, driving evasively to Staten Island. There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of narcotics by Gutierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the court to find by a fair preponderance that he had participated.

While the two visits raise suspicion, suspicion is not enough. For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become

a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits. Relying on *United States* v. *Manfredi, supra,* the government contends that in addition to Venetucci's visits there was circumstantial evidence in the form of "verbal acts" by Sorrentino that showed Gutierrez's participation in the conspiracy. It is true that in several Sorrentino-Cirillo telephone conversations Sorrentino referred to "Frankie" Venetucci's "partner." But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible. Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof.

Although *Manfredi* went quite far in admitting "verbal acts" of a co-conspirator, it is clearly distinguishable from the present case and cannot be expanded to admit Sorrentino's hearsay statements. In *Manfredi* the statements were those of the defendant Joseph LaCosa regarding *his own personal relations* with Manfredi as a narcotics supplier and could be coupled with his own evasive personal conduct upon the occasion of his visits to Manfredi's home. We treated LaCosa's statements as circumstantial evidence because they represented the declarant's *personal knowledge*. When added to the other corroboratory cir-

cumstances we concluded that they had a "ring of reliability." Compare *Manfredi* with *United States* v. *D'Amato*, —— F.2d —— (2d Cir. March 14, 1974), Slip Opin. 2199, 2205-08. No such "ring of reliability" exists here. In the first place the statements relied upon by the government are not those of Venetucci with respect to his personal dealings with Gutierrez, which might conceivably fit within *Manfredi*, but statements of Sorrentino, who had no personal relationship at all with Gutierrez. For all we know Sorrentino may have been basing his description of Gutierrez as Venetucci's "partner" on rumors that he had heard from persons other than Venetucci. To admit such rank "double hearsay" as "circumstantial evidence" or "verbal acts" would be to make a mockery of the "non-hearsay" threshold requirement.

The danger inherent in permitting such hearsay to be used as the basis for admitting still more hearsay declarations of co-conspirators is rather obvious. Aside from the lack of opportunity to cross-examine the declarant and the obvious second-hand nature of Sorrentino's statements, out-of-court statements by Venetucci himself were introduced which suggested that Gutierrez had not agreed to participate in the narcotics scheme. Thus, in a conversation with Sorrentino on February 1, 1973, with respect to obtaining a loan to make up the $8,000 deficit in the price ultimately secured by Cirillo for the narcotics which Venetucci had agreed to buy, Venetucci expressly denied any understanding that "Frankie" was to share in payment of the deficit.

It may be that the "non-hearsay" threshold requirement for admission of hearsay declarations of co-conspirators, which had been liberalized through a series of modifications since its inception, compare *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942), and *United States* v. *Pugliese*, 153 F.2d 497,

500 (2d Cir. 1945), with *United States* v. *Geaney, supra,* will be relaxed even further to permit introduction of certain statements of co-conspirators regardless of their unavailability for cross-examination, subject to conditions that will be deemed sufficient to guarantee their trustworthiness. See Proposed Rules of Evidence for the United States District Courts and Magistrates, Rules 803(1)-(2). Until such a change is made, however, we must adhere to the standing rule which requires us to exclude hearsay where the threshold test has not been made.

Since the proof of Sorrentino's statements as to the reasons for Venetucci's visit to Gutierrez was inadmissible as evidence of Gutierrez's participation, the trial court could not properly consider it in applying the "fair preponderance" test with respect to Gutierrez. Cf. *Dutton* v. *Evans,* 400 U.S. 74, 88 (1970); *General Tire of Miami Beach, Inc.* v. *NLRB,* 332 F.2d 58, 61 (5th Cir. 1964). In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt. See *United States* v. *Fantuzzi,* 463 F.2d 683, 689-90 (2d Cir. 1972); *United States* v. *Cimino,* 321 F.2d 509-10 (2d Cir. 1963), *cert. denied,* 375 U.S. 974 (1964); *United States* v. *Bentvena,* 319 F.2d 916, 949 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963); *United States* v. *Stromberg,* 268 F.2d 256, 267 (2d Cir.), *cert. denied sub nom. Lassa* v. *United States,* 361 U.S. 863 (1959). See also *United States* v. *Glover,* 306 F.2d 594 (10th Cir. 1962).

(c) *Gaber*

The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's

presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test.[11] See *United States* v. *Fantuzzi, supra; United States* v. *Cimino, supra,* and other decisions cited on page 3316.

The decisions relied upon by the government do not support its argument that there was sufficient non-hearsay evidence of Gaber's membership in the conspiracy to admit the hearsay declarations of alleged co-conspirators. In *United States* v. *Calabro*, 449 F.2d 885 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971), in affirming a narcotics conviction, we regarded "of critical importance" the fact that the defendant, who had been present at several meetings between the seller and the intended customer, an undercover agent, carefully scrutinized the agent and at one point actually frisked him.[12] And in *United States* v. *Ragland*, 375 F.2d 471, 473 (2d Cir. 1967), we upheld the admission of hearsay evidence against a defendant only after noting

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11 Cesare's statement in one of his March 14 telephone conversations with Sorrentino to the effect that he (Cesare) had "Gabe" (Gaber) with him added nothing to the government's proof of guilty knowledge on the part of Gaber.

12 It was not actually clear from the evidence that the defendant himself frisked the undercover agent. The frisking occurred when the agent was standing at the urinal in a restaurant's men's room as the defendant and his colleague passed behind him.

that a co-defendant had not only used the "slanguage" of narcotics dealings *in the defendant's presence* but had also explicitly referred to "narcotics." Compare *Calabro* and *Ragland* with *Ong Way Jong* v. *United States*, 245 F.2d 392 (9th Cir. 1957) (conviction reversed although defendant was constantly with co-defendant who sold narcotics); *Glover* v. *United States*, 306 F.2d 594 (10th Cir. 1962) (conviction reversed although defendant seen in vicinity of narcotics transaction between co-defendant and undercover agent) and *People* v. *Garcia*, 201 Cal. App. 2d 589, 20 Cal. Reptr. 242 (1962) (conviction reversed although defendant present at time of narcotics sale).

Since the government failed to adduce sufficient non-hearsay evidence of Gaber's participation in the conspiracy, his conviction must be reversed.

Variance Between Proof and Indictment

Venetucci, Lilienthal and Cesare[13] advance the argument, frequently asserted in conspiracy cases, see *United States* v. *Borelli*, 336 F.2d 376, 380 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), that even assuming the involvement of each in one of the two transactions, the evidence showed two independent conspiracies, one in January and the other in March, 1973, rather than the single on-going conspiracy alleged. The issue turns on whether the proof warranted an inference that each of the three, in dealing with a member of the core group (Cirillo, Murphy and Sorrentino), was aware of, and thus knowingly furthered, the core group's overall on-going venture or partnership. See *Borelli*, *supra* at 385. Although a single transaction with, or function performed

13 Gutierrez and Gaber also complain of a variance as to them but we need not consider these claims since we have already concluded that the evidence was insufficient to connect them with either the January or March transaction.

for, a representative of the core group may under some circumstances be insufficient to warrant an inference of knowledge of the extensive nature of the core group's activities, see *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), we have recognized that it is "not an arbitrary rule which is to be applied rigidly and without reason." See *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Indeed, just recently we said that "it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

We are not here confronted, however, with merely a single delivery or purchase on the part of each of these three appellants (Venetucci, Lilienthal and Cesare) which, without more, might not support knowledge of a broader conspiracy, see, e.g., *United States* v. *DeNoia*, *supra*, but with deeper involvement on the part of each of these participants. Venetucci met on at least two occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

In the cases of Lilienthal and Cesare the evidence shows, in addition to their participation in a transaction involving a large quantity, that they used narcotics code language in their dealings, Lilienthal making a delivery of a half kilo in response to Cirillo's request for "half-filled out" income tax papers and Cesare negotiating for the "sample of the dress." From these circumstances, including their use of pre-arranged code language, the jury could infer knowledge that they were participating in a continuing major business which extended in scope beyond the particular transaction and depended for its success upon a chain of distribution in which each principal played an essential part. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967).

Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States*, 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that "[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence . . . as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators." In *Blumenthal* v. *United States*, 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a sim-

ilar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.

Miscellaneous Other Points

(a) *The Contents of the Paper Bag*

Sorrentino argues that his conviction on Count 2 (distribution of one kilogram of heroin on January 18, 1973) must be reversed since the government offered no direct proof that the paper bag carried by Cirillo to the meeting with Murphy, Sorrentino and Venetucci at Sorrentino's mother's apartment on the evening of January 18 contained heroin. We disagree. There was ample circumstantial evidence that the bag contained heroin. The delivery of the bag was the result of Sorrentino-Cirillo telephone negotiations in narcotics jargon and was followed by angry discussions regarding Venetucci's failure to deliver the "thirty," (e.g., $30,000), the approximate going price for a 50% pure kilogram of heroin. Later Cirillo and Sorrentino agreed to get the "dress" (i.e., narcotics) off Venetucci.

(b) *The Introduction of the Cocaine Found on Murphy and Cirillo*

Appellants Murphy and Cirillo argue that the trial court should not have permitted the government to introduce the small quantities of cocaine found on them at the time of their arrest (in addition to the half kilogram of heroin found on Cirillo) since it was evidence of crimes other than those charged in the indictment. But here the cocaine was relevant to refute the position which the government could anticipate and which counsel for Cirillo actually tried to establish during cross-examination of government witnesses, i.e., that the heroin was planted on Cirillo as a frame-up by the arresting officers. See *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973); *United States* v.

Wright, 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In any event admission of the cocaine as evidence of guilty knowledge on the part of Cirillo and Murphy was well within the trial court's wide discretion. See *United States* v. *Deaton*, 381 F.2d 114, 117-19 (2d Cir. 1967).

(c) *The Jury Charge*

During his charge to the jury the trial judge instructed that they should consider the wiretap evidence since he had determined that the wiretap orders were properly issued. "If I am wrong," he continued, "somebody else can reverse me, but you are bound to take my view of the law." Appellants Murphy and Cirillo argue that this statement, to which they excepted, impermissibly tended to establish a similar train of thought in the minds of the jurors—i.e., if they should render an erroneous verdict, someone else would reverse them. The unnecessary remark is confusing and conceivably could be interpreted several ways. However, even accepting the interpretation given to it by appellants, we are satisfied that under the circumstances of this case it was clearly harmless, in view of the overwhelming evidence against Murphy and Cirillo, including the tapes, visual surveillance and arrest with a large quantity of narcotics in their possession.

Conclusion

The convictions of appellants Gutierrez and Gaber are reversed. All other convictions are affirmed.

Office-Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 73-1987

ROBERT VENETUCCI,

Petitioner,

-against-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. .....

ROBERT VENETUCCI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert Venetucci, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, hereinafter described.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in the appendix hereto, infra, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals affirming the October 19, 1973 judgment of the District Court (E. D. N. Y., Judd, J.) was entered May 7, 1974. On May 21, 1974 petitioner filed a timely petition for rehearing. Said petition, printed in the appendix hereto, infra at was denied June 5, 1974 (51a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

1. Was Petitioner denied a fair due process trial, and his statutory (Federal and New York State) and Federal Constitutional rights to be free from illegal electronic search and seizure, by the totality of the circumstances of this prosecution?

2. Was the Court of Appeals denial, on June 5, 1974, of petitioner's petition for rehearing, made in order to correct the clear, obvious and incredible factual inaccuracies in that Court's opinion of May 7, 1974 (specifically point (d)) a violation of petitioner's due process rights under the Constitution of the United States?

3. Was petitioner denied a fair trial by prejudicial rulings on defense objections to admission of evidence (aside from the prejudicial electronic proofs, covered by Question No. 1), especially the reception of "expert" testimony "interpreting" the alleged "heroin jargon" on the electronic tapes?

4. Was petitioner denied a fair due process trial by reception of proofs as to possession of cocaine by other defendants, an offense not charged in the indictment, and the cocaine in question having been seized at a stage of the alleged conspiracy or double conspiracy long after any proved or provable participation by petitioner?

5. Was the evidence as to petitioner sufficient for submission to the jury and for conviction?

6. Was petitioner convicted of conspiracy in violation of the rules against illegal prosecution for double conspiracy; and if this Court reverses petitioner's conviction for conspiracy, should it not also reverse his convictions on the substantive counts, under the rule of United States v. Bentvena, 319 F. 2d 916, 955-956 (2nd Cir. 1963), cert. den. 375 U. S. 940?

7. Petitioner adopts those points of co-petitioners which are relevant and helpful to his case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth and Ninth Amendments (search and seizure, and privacy), the Fifth Amendment (due process) of the United States Constitution. It also involves Rules 7(f) and 16(a), F. R. Cr. P. (Bill of Particulars and Discovery).

STATEMENT OF THE CASE

Petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit, which on May 7, 1974, affirmed the judgment of the United States District Court for the Eastern District of New York (Judd, J.) entered October 19, 1973, convicting the appellant Venetucci, after a jury trial, on one count of conspiracy and two substantive counts involving heroin, and sentencing him to nine years plus seven years special parole. Petitioner also seeks review of the denial of petitioner's petition for reargument denied June 5, 1974, treated separately, infra.

The Government contended that Venetucci bought or tried to buy a kilogram of heroin from co-defendants Cirillo, Murphy and Sorrentino between about January 18 and January 22, 1973. The only proof that the parties were dealing in heroin during the alleged January 1973 transactions consisted of physical surveillance proofs of the usual sort as to peregrinations, meetings, etc., of the

parties, and the usual alleged "brown paper bag" allegedly seen by government agents during the night-time from long distances away, plus telephone wire taps "interpreted" by an "expert" in the camouflaged "jargon" of heroin traffickers; i.e., there was neither physical proof nor any other direct evidence of any kind that any of the defendants actually had or were dealing in any heroin in the January 1973 happenings.

Venetucci totally faded out of the within trial proofs within a few days after the January 1973 happenings. No arrests were made at that juncture. And this was the last we hear of Venetucci in the investigative scene of this case.

The Government claims that it then picked up a heroin trail as to several of the co-defendants -- not as to Venetucci -- around the middle of March 1973, and this time the Government made arrests and claims to have seized narcotics inculpating co-defendants. The narcotics consisted of about one-half kilogram of heroin and a small quantity of cocaine (there were no cocaine charges in this indictment, and the cocaine involved undisputedly had no connection with Venetucci).

Thus, the Government's inclusion of Venetucci, an alleged single-transaction buyer in January 1973, with an alleged ring of heroin suppliers in March 1973, emerges on this trial record as one of those arbitrary prosecutive tactics in which a defendant has been swept up

unjustly in a typical "continuing conspiracy" whirlwind. The indictment inferentially supports our contention that Venetucci had no part in the alleged March 1973 heroin happenings, as there is no substantive count against Venetucci and no conspiracy overt acts alleged as to him based on the March 1973 happenings.

As to the January 1973 substantive charges against Venetucci (counts 3 and 4), the Government's proofs, if believed, were that Venetucci was unable to raise the money for the alleged heroin purchase at that juncture and that co-defendants forced him to return the heroin -- all of which is probatively fanciful or at best utterly speculative, because, as above recited, the alleged kilogram of heroin in January 1973 remains a phantom item whose actual existence the Government never demonstrated by physical proof or by any other direct evidence.

The Venetucci defense in this trial contended that the proofs of meetings and peregrinations involving Venetucci were insufficient for submission to the jury; and that, as to the wire tap proofs, (1) tapes of conversations of co-defendants referring to "Bobby" were not probative that "Bobby" was Robert Venetucci because such identification is purely speculative and because the actual person indicated by the name of "Bobby" was "Bob the Greek" on the tapes, the Government offering no proof identifying "Bob the Greek" with Robert Venetucci; and (2) the tapes on which Venetucci's own voice allegedly appears are

unprobative for lack of voice identification and were in any event unconstitutionally admitted into evidence.

Aside from the electronic proofs, the principal testimony in this trial directly relating to Venetucci appears in the trial minutes at Tr. 236-240, 275-290, 380-394, 488-489, 570-575, 611-630, 634-645, 677-681, 688-696, 762-791.

Concerning petitioner's petition for rehearing summarily denied June 5, 1974, said petition was made in order to correct clear, obvious and incredible inaccuracies in the Court of Appeals' opinion concerning their point (d) entitled "Surprise" Disclosure of Venetucci Conversations. (20a-23a)

The indictment in this case was filed April 4, 1973. Shortly thereafter, commencing later in April or in May, the Government informed defense counsel that there were telephone wire taps, under New York State Supreme Court (Kings County) warrants on telephones of co-defendants Cirillo and Sorrentino, and the Government commenced (pre-trial) turning over typewritten transcripts of the wire taps to defense counsel and promised to provide the wiretap logs. In all, some 90 transcripts, totalling hundreds of pages, were thus turned over to defense counsel pre-trial, together with copies of the Court wire tap orders and the application papers on which those Court orders had been issued.

On May 17, 1973 Assistant United States Attorney Heinemann told Robert A. Fried, Esq. as associate of Venetucci's counsel Jacob P. Lefkowitz, that "none of the tapes contained any conversation purported to be that of the defendant Robert Venetucci" (affirmation of Robert A. Fried in the Court below on July 17, 1973) (42a-44a). "This was confirmed when the transcripts were made available; that is, none of the transcripts (represented as "complete" 37a) furnished to defense counsel pursuant to defendant's motions (for a bill of particulars and pre-trial discovery) contained any conversation alleged to be that of the defendant Robert Venetucci" (ibid). Further, on June 12, 1973 Mr. Venetucci and counsel, after appearing before Judge Judd, went with other counsel to view the video tapes herein. After viewing the tapes counsel again asked and was informed by the Assistant United States Attorney that there were no audio tapes of Mr. Venetucci (p. 17). For further detail concerning the pre-trial aspects of this matter, see the petition for rehearing (36a-51a). This was again confirmed by Assistant United States Attorney Heinemann on the second day of the trial herein, July 10, 1973, at p. 67 of the trial minutes:

"THE COURT: Mr. Heinemann, tell me about this remark about the wiretap. Did you mean to say there are wiretaps of Venetucci?

"Mr. Heinemann: No, I don't think there is anything I said to indicate that..."

The trial herein started July 9, 1974. The Prosecutor's opening made much reference to the forthcoming wiretap evidence and outlined the intended proofs against Venetucci, saying nothing about any wiretap overhearing of Venetucci's voice (Tr. 38-47). In Venetucci's opening to the jury, Mr. Lefkowitz assured the jurors that "***no evidence whatsoever, whatsoever, will be presented in this courtroom against Robert Venetucci except jingle bells. He (the Prosecutor in his opening) mentioned half a dozen times or more about wiretap telephone conversations. Not of my client. ***" (Tr. 52).

Meanwhile, on May 24, 1973, pre-trial counsel for defendants Cirillo and Murphy moved to suppress the wiretap evidence, upon affidavits and a memorandum of law challenging the validity of the Kings County Supreme Court wiretap orders on a number of grounds. Venetucci, of course, had no standing to make any such pre-trial motion to suppress, because we were assured his voice was not on any of the tapes and the transcripts which we had been given theretofore (as well as all the subsequent transcripts we were given pre-trial) contained no conversation of Venetucci. Doubtless because of everyone's information, under the Prosecutor's assurances, that Venetucci's voice was not on any of the wiretaps, counsel for Cirillo and Murphy did not even serve us with copies of their wiretap suppression motion papers, nor did we have (nor in the circumstances were we called upon to have) anything other than a pro forma participation

in those suppression proceedings. (In fact, the first we ever saw of the Cirillo-Murphy pre-trial wiretap motion papers was on December 24, 1973 when, in preparing this appeal, we were at last able to obtain copies, after much travail.)

Judge Judd denied the Cirillo-Murphy wiretap motions in a memorandum and order filed June 27, 1973, without an evidentiary hearing.

And so, when the trial commenced on July 9, 1973, Venetucci and his trial counsel were in the position of not having challenged the wiretap orders, of not having moved to suppress the wiretap evidence, and of having represented to the jury in counsel's opening that there would be no wiretap evidence of any conversation of Venetucci. In order words, as this trial commenced, the Venetucci defense was committed to -- locked in to would be the truer description in view of the astounding aftermath -- A defense position comfortably oblivious of any inculpative wiretap evidence of Venetucci's voice.

We would respectfully emphasize the above procedural factor, that Venetucci had not, could not have, participated in pre-trial suppression proceedings.

On the fifth day of this trial, July 17, 1973, which was eight calendar days after the trial commenced (July 9) and when the stenographic minutes of the trial had consumed 794

typewritten transcript pages, the Prosecutor suddenly announced, for all the world as though it were the most casual and inimportant thing that could be pleasantly imagined, that "something else has come up" (Tr. 794), namely, that "last night***we discovered some conversations I thought would be pertinent***. It is a phone call to Sorrentino by Robert Venetucci" (Tr. 794-795). This soothingly worded brandishment of the Government's constitutionally shocking bombshell did not soothe defense counsel Lefkowitz, who instantly reacted with shock and indignation (Tr. 795-798). Strangely less unsoother, however, was the Trial Judge, whose well-known gentlemanly judicial composure prevailed even in this discomposed courtroom juncture (ibid) where, we respectfully suggest, the situation called instead for a manifestation of the instinct for appropriate judicial displeasure and vehement expression thereof. We are sure that this Court will wish to examine for itself the further ensuing record materials where the parties and the Court below waged out the unfolding controversy over the Prosecutor's all-but incredible handling of the electronic proofs in this case affecting Venetucci. See, in addition to the above cited Tr. 794-798, also Tr. 804-809, 813-814, 849-862, 868-872, 961-963, 967-975, 993, 1238-1244, 1387-1418, 1420-1423, 1431, and the Venetucci motion dated July 18, 1973 supported by the previously mentioned affirmation of same date by Robert A. Fried, Esq. (42a). The foregoing, we believe, are all of the pertinent references on the topic in question.

The final outcome in the Court below was that the Judge ruled that the belatedly discovered "Venetucci" tapes should be played for the jury (Tr. 1387-1418, 1431).

REASONS FOR GRANTING THE WRIT

1. This matter provides an opportunity for this Court to clarify the respective duties of both defense counsel and government concerning pre-trial discovery in cases involving extensive electronic proofs. That is, should defense counsel be entitled to rely on a representation by an Assistant United States Attorney, pursuant to a required pre-trial conference, that the defendant is not on audio tape or should counsel be required to listen to "3,700" hours of wiretap conversation or undertake extensive investigation in order to discover if the Assistant United States Attorney or his agents did their homework? It is conceded by the government that they inadvertently failed to disclose the existence of the alleged Venetucci conversation to counsel for petitioner until the fifth day of petitioner's trial.

The law is clear that a defendant is entitled to know whether any statements of his were seized or obtained through electronic surveillance, and the substance of such statements so the appropriate motions can be made and to avoid prejudicial surprise at trial. See Alderman v. United States, 394 U. S. 165 (1969); United States v. Crisona, 416 F 2d 107 (2nd Cir. 1969) cert. denied, 397 U. S. 961

(1970). Here petitioner, in the belief he lacked standing, did not file any such motions and was obviously prejudicially surprised at trial. It is also clear, in the Second Circuit, that failure to disclose statements of the defendant, if prejudicial, is grounds for a new trial. Concerning such failure to disclose the Second Circuit Court of Appeals has stated "We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial". United States v. Padrone, 406 F 2d 560, 561 (2d Cir. 1969). Admittedly the government's failure to disclose was not in noncompliance with a Court order. However, under current practice defense counsel meets informally with the Assistant United States Attorney and they attempt to dispose of the pre-trial motions without the necessity of having to go before the Court to obtain an order, as was done here. It is submitted that there should be no difference in the Government duty if the motions are disposed of without the necessity for a Court order. Therefore, the only question here should be whether or not petitioner was prejudiced by this failure to disclose. The prejudice inherent from the failure by the trial Court to preclude introduction of the conversations in question was so substantial and irremediable that a new trial should have been granted.

The totally effective denial to petitioner of his constitutional and statutory rights to move procedurally pre-trial against these wiretaps is sufficient, without more, to require a reversal and remand for a new trial. This is not to mention the prejudice to Venetucci of letting the jury hear the tapes after the jurors had been told by defense counsel in his opening that the Government assured us no such tapes existed (Tr. 52), and the concomitant prejudice of misleading the Venetucci defense into committing itself to a trial preparation and a trial strategy based on the assurance that no such tapes existed. Venetucci's above-mentioned motion of July 18, 1973 requested a stay or a severance for opportunity to challenge the validity of the belatedly announced wiretapes and/or to re-prepare Venetucci's trial defense in light of those wiretapes.

We are not speaking in mere constitutional abstractions divorced from the factual and decisional impingements of this trial and pre-trial record; the situation is not one of "harmless error". In the trial, what were the proofs against petitioner aside from the mid-trial "bomb-shell" wiretap proofs? Venetucci was seen peregrinating, he was seen meeting with co-defendant in January 1973. No "heroin" transaction was probatively established via the proofs of those peregrinations and meetings. Further (aside from the belated "bomb-shell" wiretap proofs allegedly containing Venetucci's own voice), there were references in the non-Venetucci wiretaps to "Bobby". We

respectfully contend that those non-direct "Bobby" items taken together with the proofs of peregrination and meetings in January 1973, would not have been enough to give the Government a case for submission to the jury much less for proof of guilt beyond a reasonable doubt. In fact, petitioner was never even seen with usual brown paper bag, necessary to cases such as these. Therefore, the "bomb-shell" wiretaps re Venetucci were crucial for the Government's prima faci case (if voice identification requirements were met, as to which see below). The alleged "direct" Venetucci tapes were therefore quite concretely necessary for the Government's conviction proofs, and as we said above, the constitutional impingements are dispositively concrete and in nowise merely abstract on this trial record.

As to the "Bobby" references on wiretaps of conversations to which Venetucci was not a party, see Tr. 558, 1399-1407, revealing that, not only was the mere name "Bobby" non-probative of alleged identification with Venetucci, but that this "Bobby" was indicatively an entirely different person, "Bob the Greek". See also Government's Exhibits 43 and 47, referring to "Bob the Greek". (Mr. Venetucci is of Italian ancestry.)

Further as to the voice identification of Venetucci on the belatedly discovered tapes (Exhibits 44 and 46) see Tr. 1387-1418; and, at Tr. 1420-1423, see how the Government, even after the tapes were played, remains so quaveringly unsure of its position on this

voice identification that the Prosecutor asked the Trial Judge for permiss ion to take belated proofs on this question, which the Court declined to allow at that late juncture. And, even after the jury verdict the Prosecutor tried to shore up his record, for appeal purposes, in regard to our contention that Robert Venetucci was not "Bobby" but that "Bobby" was instead "Bob the Greek", a different individual (Tr. 2093-2094).

2. The opinion of the Court of Appeals, was clearly and incredibly erroneous as to certain factual issues concerning the availability of wiretap logs herein, and the credibility of Mr. Lefkowitz' associate Mr. Fried which could have been easily resolved by the record (see the pre-trial minutes of June 12, 1973 at page 5, wherein Mr. Borg, attorney for co-defendant Cirillo, complains of the lack of availability of the Cirillo logs and is informed by Assistant United States Attorney Heinemann that the logs would be available within a few days). The Government's own appeal papers (where they state at p. 10 that the copies of the Sorrentino and Cirillo logs were not completed until June 15, 1973) to sworn petition for rehearing (36a , which sets forth the pre-trial sequence of events) and the affirmations of other attorneys herein, which would be made available, upon request of the Court (41a). For example, Paul E. Warburgh, Jr. of Kassner and Detsky, appeared for Mr. Gutierrez was told unequivocally by Mr. Heinemann that Mr. Gutierrez was not on the tapes. This conversation occurred during

the first week of May 1973, and prior to Mr. Heinemann's discovery conference with Jacob P. Lefkowitz' associate. It is fortunate that Gutierrez was not on the tapes, as Mr. Warburgh having relied on the assurances of the Assistant United States Attorney, and realizing he had no standing for a suppression motion did not look at the logs, which, in any event, were not "readily available" at that time (such and further affirmations are available to this Court if requested).

Therefore, in light of the above, it is beyond belief that the Court of Appeals could state, as it did, that "at least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel". This is simply not true. The time the logs actually became available (and never readily), less than one month prior to trial, counsel for Venetucci having relied upon the assurances of the Assistant United States Attorney and counsel's own investigation of the available transcripts represented as "complete" (37a) was of the justifiable opinion that petitioner had no standing for a motion to surpress and thus did not look at the logs when they did become "available". Further, the Court of Appeals stated that they doubted that Mr. Heinemann categorically conceded on May 17 that none of the tapes contained any Venetucci conversations (23a). Yet that was the substance of what occurred (36a-44a) although admittedly Mr. Heinemann did not guarantee the accuracy of his statements but there appeared to be no

reason to doubt those statements, after all he was the Assistant United States Attorney in charge of the case and he should have some idea of what his evidence concerns. Certainly, the sworn statement of a member of the bar (Mr. Lefkowitz' associate 36a-44a) should have had some small amount of credibility and at the very least, this case should have been remanded for a hearing to ascertain the correct facts.

3. Concerning the point that petitioner was convicted of conspiracy in violation of the rules against illegal proseuction for double conspiracy:

The Court charged the jury at Tr. 1951-1952 that they could find guilt on the conspiracy count only against the persons who were members of both conspiracies (the January and March 1973 conspiracies).

At Tr. 1918-1919 Venetucci's counsel moved for dismissal on the conspiracy count because of the evidence of withdrawal or termination of Venetucci's alleged participation at the January 1973 stage.

We contend that, in convicting Venetucci on the conspiracy count, the jury failed to follow the Court's instructions. The record facts cannot support such conspiracy conviction of Venetucci in light of the segregation of the January and March segments of the alleged conspiracy, as a matter of fact and as a matter of law. Cf. United States v. Borelli, 336 F 2d 376, 384-390 (2d Cir. 1964), cert. den. 379

U. S. 960.

If we are correct in the above contention, then there also become applicable the rule of United States v. Bentvena, 319 F 2d 916, 955-956 (2d Cir. 1963), cert. den. 375 U. S. 940, that is, petitioner in such event would become entitled to reversal on the two January 1973 substantive counts (counts 3 and 4).

4. Concerning Question number 3:

The Government, over defense objection, introduced testimony from an "expert" witness Garcia (Tr. 1438-1587) to "interpret" for the jury the alleged "heroin jargon" on the wiretaps.

To discuss in detail Garcia's lengthy testimony is beyond the scope of this petition; we respectfully ask the Court to examine the Garcia testimony. For, we contend that this "expert" testimony was classically violative of the rules of evidence -- and, in the setting of a criminal prosecution, of the requirements of due process -- governing the use of "expert" testimony with a view to preventing a "jury-over'awing" result or interferring with the jurors' duty and power to make "ultimate" determinations of trial fact. E. g., United States v. Ward, 169 F 2d 460 (3d Cir. 1948); Riley v. United States, 225 F 2d 558 (Dist. Col. Cir. 1958); United States v. Rosenberg, 108 F. Supp. 798 (S. D. N. Y. 1953), affd. 200 Fd 666, cert. den. 345 U. S. 965.

5. The introduction of the cocaine found on co-defendants Murphy and Cirillo at the time of their arrest on March 15, 1973 not charged in the indictment as part of any conspiracy, and certainly long after petitioner dropped out of the evidentiary picture was extremely prejudicial to this petitioner especially in light of the general public present hysterical attitude where any drugs (especially those called "narcotics") are concerned. Due to this attitude any trial Court should be especially careful to avoid such prejudice in order that defendants' due process rights to a fair trial are to be preserved in any case alleging drug involvement.

This clearly was not done here, in fact, the opposite occurred to the prejudice of petitioner's fair trial due process rights. This Court now has the opportunity to correct this situation and prevent it's occurance in the future by setting forth how a trial Court should proceed when a sensitive emotional issue such as drugs is involved.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted

JACOB P. LEFKOWITZ
Attorney for Petitioner
Robert Venetucci

JUDGMENT AND COMMITMENT
OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ROBERT VENETUCCI
a/k/a "Bobby"

On this 19th day of October, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Jacob Lefkowitz, Esq.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C. Sec. 841(a)(1)846 and T18, U.S.C.Sec. 2, in that on or about and between Dec. 6, 1972, and Mar. 16, 1973, both dates being approximate and inclusive, the defendant, with others, knowingly, intentionally and unlawfully did conspire to distribute and possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance as charged in counts 3, 4 & 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 9 years to run concurrently on counts 3, 4 & 9 plus special parole term of 7 years. Defendant continued on bail pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Orrin G. Judd
United States District Judge

F I L E D

U.S.D.C.
E.D.N.Y.

OCT 19 1973

ORDER AFFIRMING JUDGMENT
OF DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of May one thousand nine hundred and seventy-four

Present:

HAROLD R. MEDINA
WALTER R. MANSFIELD
JAMES L. OAKES

Circuit Judges.

United States of America,
Plaintiff-Appellee

v.

Alphonse Cirillo, a/k/a "Fuzzy", Vincent Murphy, a/k/a "Murph", Salvatore Sorrentino, a/k/a "Brother", Robert Venetucci, a/k/a "Bobby", Francisco Gutierrez, a/k/a "Frankie", Theodore Alfred Lilienthal, Lawrence Cesare, a/k/a "Larry", and Abe Gaber, a/k/a "Gabe",
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and they hereby are reversed as to appellants Francisco Gutierrez and Abe Gaber, but as to all other appellants said judgments be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

BY s/ Vincent A. Cahn
Chief Deputy Clerk

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 676, 677, 684, 688, 730, 762, 763, 796—
September Term, 1973.

(Argued February 14, 1974 Decided May 7, 1974.)

Docket Nos. 73-2426, 73-2615, 73-2554, 73-2796,
73-2555, 73-2644, 73-2645, 73-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILIENTHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants-Appellants.

Before:

MEDINA, MANSFIELD and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge,* convicting (1) all appellants of conspiracy to distribute narcotics in violation of 21 U.S.C. §846, (2) Alphonse Cirillo, Vincent Murphy, Robert Venetucci and Theodore Lilienthal of possession of narcotics with intent to distribute in violation of 21 U.S.C. §841, (3) Alphonse Cirillo, Vincent Murphy, Robert Venetucci, and Salvatore Sorrentino of attempting to distribute

narcotics in violation of 21 U.S.C. §846, (4) Alphonse Cirillo, Vincent Murphy, Salvatore Sorrentino, and Theodore Lilienthal of distribution of narcotics in violation of 21 U.S.C. §841(a)(1), and (5) Lawrence Cesare of attempting to possess narcotics in violation of 21 U.S.C. §846.

The convictions of Gutierrez and Gaber are reversed. All other convictions are affirmed.

HAROLD BORG, Esq., Kew Gardens, N.Y. (Arnold E. Wallach, Esq., of counsel), *for Appellant Cirillo.*

STEPHEN R. LAIFER, Esq., Brooklyn, N.Y., *for Appellant Murphy.*

IRVING SABLE, Esq., Far Rockaway, N.Y., *for Appellants Sorrentino and Cesare.*

JACOB P. LEFKOWITZ, Esq., New York, N.Y., *for Appellant Venetucci.*

PAUL E. WARBURGH, JR., Esq., New York, N.Y. (Kassner & Detsky, New York, N.Y., of counsel), *for Appellant Gutierrez.*

CHARLES T. MCKINNEY, Esq., New York, N.Y., *for Appellant Lilienthal.*

JULIUS WASSERSTEIN, Esq., Brooklyn, N.Y., *for Appellant Gaber.*

GUY L. HEINEMANN, Assistant United States Attorney (Edward John Boyd, V, United States Attorney for the Eastern District of New York, Raymond J. Dearie, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

On this appeal we encounter a narcotic distribution conspiracy of the familiar "chain type" involving sophisticated suppliers, middlemen and customers who dealt in substantial amounts of heroin, conducting their business through use of coded narcotics trade language or jargon in which innocent phrases were used to describe heroin, prices and parties. After a jury trial before Judge Orrin G. Judd of the Eastern District of New York all appellants were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. §846 (Count 9). Additionally appellants were convicted on other counts as follows:

Counts	*Appellants*[1]
1: (possession with intent to distribute 1 kilogram of heroin)	Cirillo and Murphy
2: (distribution of the same kilogram of heroin)	Cirillo, Murphy and Sorrentino

1 Appellants were sentenced as follows:

Cirillo — 14 years, 9 months on Counts 1 and 2 (concurrent) and 10 years special parole; 10 years on Counts 7 and 9 (concurrent but consecutive to sentences on Counts 1 and 2) and 10 years special parole; $10,000 fine on Count 9.

Murphy — 10 years on Counts 1, 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Sorrentino — 10 years on Counts 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Venetucci — 9 years on Counts 3, 4 and 9 (concurrent) and 7 years special parole.

Lilienthal — 8 years on Counts 5, 6 and 9 (concurrent) and 5 years special parole; $2,500 fine on Count 9.

Cesare — 5 years on Counts 8 and 9 and 5 years special parole.

Gutierrez — 5 years on Count 9 and 5 years special parole.

Gaber — 5 years on Count 9 and 5 years special parole.

Presently all appellants except Cirillo are free on bail pending decision of their appeal.

Counts	*Appellants*[1]
3 and 4: (possession of the same kilogram with intent to distribute and attempted distribution)	Venetucci
5 and 6: (possession and distribution of ½ kilogram of heroin)	Lilienthal
7: (attempted distribution of the ½ kilogram)	Cirillo, Murphy and Sorrentino
8: (attempt to possess the ½ kilogram)	Cesare

Finding insufficient evidence of guilt, we reverse the convictions of appellants Gutierrez and Gaber. The convictions of all the other appellants are affirmed.

The government's proof consisted largely of tapes and transcripts of some 40 intercepted conversations occurring over the home telephones of Cirillo and Sorrentino, supplemented by testimony of surveilling agents and a video tape of a meeting of four of the conspirators. Initial authorization for the wiretap of Cirillo's phone was given in a warrant order issued on October 31, 1972, by Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate Division, pursuant to New York's eavesdropping statute, N.Y.C.P.L. §§700.05, *et seq.*, after he found on the basis of affidavits submitted by the Kings County District Attorney and a state police detective, that there was probable cause to believe Cirillo was committing narcotics offenses and that evidence of these offenses could be obtained by wiretapping Cirillo's phone. This warrant was extended for four additional 30-day periods by Justice Rabin of the Appellate Division.

Initial authorization for the wiretap of Sorrentino's phone was given in a warrant issued on January 25, 1973, pursuant to the New York statute by Justice Irwin Brownstein of the New York State Supreme Court, which was extended for two additional 30-day periods.

The evidence, viewed in the light most favorable to the government, reveals the following: At 7:00 A.M. on January 18, 1973, Cirillo called Sorrentino and said he wanted to see Sorrentino and "Bobby" (Venetucci). Later that morning Sorrentino and Venetucci spent two hours at Cirillo's home in Little Neck, New York. Thereafter Sorrentino phoned Cirillo to ask whether he should "take the kid out of school" at around 4:00 P.M., to which Cirillo replied, "No, its figured most likely, like the kids going to school tonight." James Garcia, a detective with the New York City Police Department, testified, on the basis of his extensive experience in narcotics investigations, that he would interpret the "kids going to school" language as narcotics coded vocabulary for delivering narcotics.

As the result of a further phone call Cirillo, carrying a rolled up brown paper bag, a type of unobstrusive container frequently used for transportation of narcotics, and accompanied by Murphy, met at 10:30 P.M. with Sorrentino at the apartment of the latter's mother on West 8th Street where they were joined by Venetucci, who arrived at about 11:30 P.M. and left 15 minutes later. Venetucci drove directly to 120 Bay 11th Street in Brooklyn where he met appellant Frank Gutierrez on the street. Both then spent two hours in Gutierrez's apartment, following which Venetucci returned to West 8th Street and Avenue U, where he was seen arguing on the street with Sorrentino, Cirillo, and Murphy.

On the next day, January 19, a series of phone conversations between Cirillo and Sorrentino (during one of which

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"Bobby" Venetucci was present on Sorrentino's end of the wire) revealed that the argument had arisen because of Venetucci's failure to come up with the money for the narcotics that had been delivered to him the night before by Cirillo, Murphy, and Sorrentino. Venetucci had been unable to locate his "partner" who was supposed to make payment. Sorrentino reported to Cirillo that although Venetucci called from "Bay 14th" (Gutierrez's address), the money had not been received. Sorrentino assured Cirillo that he had told "Bobby" (Venetucci) that Cirillo would not take the "thing" back but wanted the agreed price of $30,000. (At that time the market price for a kilogram of 50% pure heroin ranged from $25,000 to $38,000.) In an effort to obtain the purchase price, a meeting was held that night between Cirillo, Murphy, and Sorrentino, followed by a Sorrentino-Venetucci meeting. The upshot was that while "Bobby" (Venetucci) was finally able to reach his partner "Frankie" by telephone, neither "Bobby" nor "Frankie" could produce the money. Meanwhile Sorrentino expressed concern that the "stuff" (narcotics) was still in Venetucci's house.

The efforts to obtain payment of the $30,000 price for the narcotics continued with Cirillo, the supplier, putting pressure on Sorrentino, the middleman, and the latter in turn pressing Venetucci, who supposedly was looking to his "partner" for payment. On the afternoon of January 22, Venetucci went to Grace's Discount Dress Shop on 11th Avenue in Brooklyn, owned by the wife of Gutierrez, and shortly thereafter Gutierrez entered. Two hours later Venetucci left the shop but returned within a half hour when, before reentering, he walked up and down the opposite side of the street in an apparent effort to determine whether he was being followed. Venetucci finally left the shop at 6:00 P.M. and proceeded in his automobile to Staten

Island, driving evasively when he spotted surveillance agents behind him.

By January 25, still unpaid, Cirillo and Sorrentino, who were beginning to lose their patience, resolved to give "Bobby" (Venetucci) a "good workout" and then get the "dress off him" (i.e., secure the return of the narcotics). In this they succeeded, for on the evening of January 26 Sorrentino, Murphy, and Cirillo, who was carrying a brown paper bag, all entered Sorrentino's house in Brooklyn. Three days later Venetucci was told by Sorrentino that "they got rid of it for 22" (i.e., sold the narcotics for $22,000), leaving an $8,000 balance, which Venetucci and his partner were expected to pay. Negotiations regarding the $8,000 deficit followed, with Venetucci trying to persuade Cirillo and the "other guy" to absorb half the loss on the understanding that Sorrentino and Venetucci would make up the other half. Cirillo, however, kept insisting that Sorrentino, Venetucci and "Frankie" pay the entire $8,000.

Discouraged but apparently not resolved to abandon their business relationship, Sorrentino and Cirillo, on March 9, 1973, began discussing another transaction. At 5:45 P.M. on that date Sorrentino advised Cirillo by phone that he had "met some nice people" who thought the "figure" for the "dresses" (i.e., the price for narcotics offered by Cirillo and Sorrentino) was "very good." Several days later, on March 14th, Sorrentino called Cirillo and ordered another "dress" which, according to Detective Garcia, meant another order of narcotics. At this point Cesare, the prospective purchaser, appeared on the scene and asked Sorrentino for delivery of "a sample of that dress." Upon receiving this message from Sorrentino, Cirillo went into action. He called Lilienthal's home and, upon learning that "Ted" (Lilienthal) was not expected home until 7:00 P.M., left a message instructing Ted to bring him back "those in-

come tax forms, the one . . . half filled out . . ." (i.e., a half-kilo of heroin). With a view to making the purchase Cesare, accompanied by Gaber, proceeded to the White Castle parking lot near Sorrentino's home where they waited in vain for 3½ hours for the narcotics to be supplied by Lilienthal and departed only after Sorrentino and Cirillo were unable to locate the supplier (Lilienthal).

On the following day, March 15th, Cirillo reached Lilienthal by phone and in response to his request for the "paper that I half filled out" (half-kilo of narcotics) Lilienthal indicated that he had it. Shortly thereafter Lilienthal visited Cirillo's residence, apparently for the purpose of delivering the half-kilo. Cirillo then called Sorrentino to advise that he and "Murph" would go to Sorrentino's residence. Sorrentino then told Cesare, the prospective customer for the half kilo, to call back some time after 7:30 P.M.

At 7:15 P.M. on March 15th Cirillo and Murphy, intending to rendezvous with Sorrentino for the narcotics delivery, entered the parking lot near Sorrentino's house where they were promptly arrested by federal narcotics agents and New York police. A search revealed a half kilo of heroin and small quantities of cocaine in their possession. The area was quickly cleared in order not to arouse Sorrentino's suspicions. At 8:00 P.M. Sorrentino informed Cesare by phone that he was still waiting for his "friends" (i.e., Cirillo and Murphy) to get there.

At approximately 10:00 P.M. on March 14th Cesare, the prospective customer, together with Gaber and an individual identified as Jerry Collins, arrived at Sorrentino's house. Cesare and Gaber went inside and exited with Sorrentino at 10:15 P.M. Sorrentino talked with Cesare, Gaber and Collins in the parking lot outside his house for about 45 minutes before he got in his own car and drove around for approximately a half hour. When Sorrentino returned, all four men went to a nearby restaurant

until approximately midnight when, after making a call from a nearby public telephone booth, Sorrentino went back into his residence and the other three men drove off in their car. At this point the car driven by Cesare was stopped by a narcotics agent and, when all the occupants were asked to produce identification, Gaber said that they were only in the area to see "Brother." Cesare added, "[Y]eah, Brother Salvatore Sorrentino."

In addition to the tapes and transcripts and the testimony of the surveilling agents, the government introduced the items seized from Cirillo and Murphy on the evening of March 15th, which included the brown paper bag, bag of half kilo of heroin, a small bag of cocaine taken from Cirillo, and a small amount of cocaine wrapped in tin foil that had been taken from Murphy.

On July 27, 1973, the jury returned a verdict finding all appellants guilty of conspiracy to distribute narcotics and various appellants guilty of narcotic offenses as shown above. However, Gutierrez was found not guilty of attempting to possess narcotics in connection with the January transaction and Gaber was found not guilty of attempting to possess narcotics in connection with the March transaction. We turn to the numerous claims of error asserted on this appeal.

Discussion

Use of Wiretap Evidence

Several appellants challenge the constitutionality of the New York State eavesdrop statute, N.Y.C.P.L. §§700.05, *et seq.* However, the provisions of that statute are authorized by and conform to similar provisions of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, see 18 U.S.C. §§2516(2), 2518 (1970), which we held to be constitutional in *United*

States v. *Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). See also *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411 U.S. 905 (1973). For the reasons stated in *Tortorello* we reject the constitutional claim and turn to the other wiretap issues raised by appellants.

(a) *Validity of Original Wiretap Order*

The first warrant order authorizing a wiretap of Cirillo's home phone, which was issued on October 31, 1972, and broadly authorized interception until November 29, 1972, of communications of types particularly described, contained no direction that the interception should be conducted "in such a way as to minimize the interception of communications not otherwise subject to eavesdropping," as required by §700.30(7) of the statute, see N.Y.C.P.L. §700.30(7).[2] Several appellants join in Cirillo's argument that the omission of a minimization directive rendered this initial order fatally defective so that any conversations intercepted as a result of it or its subsequent extensions[3] should have been held inadmissible at trial. We disagree.

The first six paragraphs of §700.30 of the state statute limit the scope of an eavesdropping warrant by requiring it to specify, among other things (1) the name of the per-

2 Section 700.30 provides:

"An eavesdropping warrant must contain:

* * * * *

"7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; . . . ."

3 Since the application for these extensions was based on conversations intercepted as a result of the first order, if the first order were invalid, the subsequent extensions would be "tainted" by the primary illegality.

son, if known, whose communications are to be intercepted, (2) the nature and location of the communications facilities as to which authority to intercept is granted, (3) a particular description of the type of communications sought to be intercepted, (4) a statement of the particular designated offense to which they relate, (5) the identity of the law enforcement agency authorized to intercept the communications, and (6) the period of time during which the interception is authorized. Paragraph 7 then provides that the warrant must also contain the above-quoted direction to "minimize" the intereception of non-pertinent conversations. Recognizing that paragraph 7 is essentially a summation of "the more specific requirements of 700.30(1)-(6), all of which lead to 'minimization,'" we held in *United States* v. *Manfredi*, Slip Opin. at 5593, 5611-12 (2d Cir. Nov. 23, 1973), that, when the orders and supporting affidavits are construed in "a commonsense and realistic fashion," see *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965), mere omission of the "talismanic minimization language" from a wiretap order otherwise in compliance with the statute would not render the warrant invalid under state law, which governs, at least where the supporting affidavits evidenced an actual knowledge of the minimization requirement and an agreement to abide by it. See *People* v. *Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973). While here the supporting affidavits contained no specific agreement "to limit the seizure of conversations to those specifically pertaining to the [alleged] Penal Law violations," as the affidavit did in *Manfredi*, there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it.

The investigation of Cirillo was conducted jointly by the District Attorney for Kings County and the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Mar-

tin Hershey, the assistant in charge of the Narcotics Bureau in the King's County District Attorney's Office who directed the investigation, Alexander Dovetko, a special agent with BNDD who supervised the federal agents engaged in the investigation, and Guy Heinemann, the Assistant United States Attorney for the Eastern District who also participated in the joint investigation, all submitted affidavits stating that they were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap, who were ordered to turn off all recording and listening devices whenever they were able to determine that nonpertinent conversations were being intercepted. Agent Dovetko visited the Cirillo wiretap almost daily from its inception and personally observed agents and officers complying with these instructions. Furthermore, during the period covered by the first warrant, the listening and recording of over a quarter of the completed calls was terminated as soon as nonpertinency was determined.[4] These logs, which we have reviewed, support Dovetko's conclusions.[5]

In other contexts New York appellate courts have excused purely technical defects in the form of a search warrant that has been executed according to statutory requirements. Compare *People* v. *Glen*, 30 N.Y.2d 252, 331 N.Y.S.2d 656, *cert. denied sub nom. Baker* v. *New York*, 409 U.S. 849

4 The affidavit stated that "[o]f 496 telephone calls made or received, 120 were incomplete (no answer, busy or wrong number). Approximately 287 were listened to completely and approximately 93 were listened to only initially and then turned off when it was determined that they were non-pertinent."

5 Termination for non-pertinency is indicated on the logs by the letters "N/P." Whenever these letters appear, there is no further description of the conversation in the log and the log indicates, by showing that only one or two feet of tape elapsed during that particular interception, that the recording and monitoring devices were shut off as soon as the determination of non-pertinency had been made.

(1972) (the "fact that the warrant would on its face authorize an improper search does not undo it for all purposes") with *People* v. *Varney*, 32 App. Div. 2d 181, 301 N.Y.S.2d 330 (1969) (technical defects may be overlooked where search is conducted lawfully). The omission of a minimization directive was a "technical defect" under the circumstances of this case where its absence could not, assuming proper attention to the provisions of the warrant, lead to a greater invasion of privacy than was justified by probable cause. Cf. *Smith* v. *United States*, 360 U.S. 1, 9 (1959) (deficiencies are "technical" where no substantial rights are involved). Since the first order in this case was in "substantial compliance" with the statute we hold that it was valid. Compare *Manfredi*, *supra*, with *United States* v. *Poeta*, 455 F.2d 117, 121 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) and *United States* v. *Rizzo*, Slip Opin. at 1675 (2d Cir. Feb. 7, 1974).

b) *Failure to Hold a Minimization Hearing*

Appellants next argue that the district court should not have denied their motions to suppress the wiretap evidence without first holding an evidentiary hearing to determine whether minimization had in fact been achieved during the entire course of the wiretap of the Cirillo and Sorrentino phones. In denying the motions to suppress the district court relied on the Dovetko, Hershey and Heinemann affidavits and on his own review of the logs kept during the Cirillo and Sorrentino wiretaps.

The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed further that at all times the Cirillo and Sorrentino wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and

officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity."[6] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the statutory minimization directive. See *United States* v. *Rizzo*, Slip Opin. at 1491-95 (2d Cir. Jan. 17, 1974). Indeed, the prima facie showing is even stronger here than in *Rizzo*, which also upheld a wiretap conducted pursuant to the New York statute. There the state police

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6 The affidavit stated:

"Special Agent Nicholas Alleva and Special Agent William Malarney, have reviewed the logs for both the Cirillo and Sorrentino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be nonpertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time. 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent."

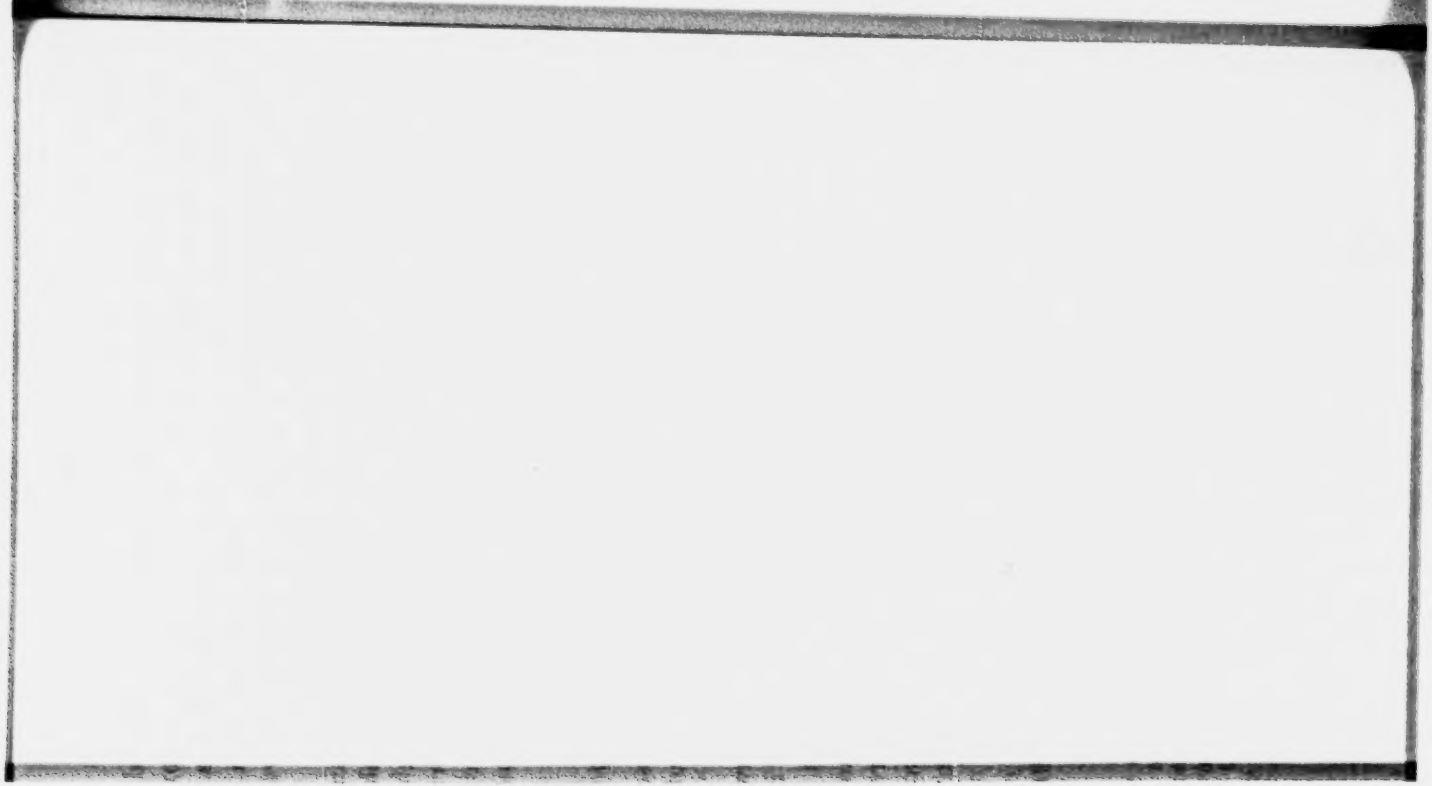
detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve minimization.[7] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.

(c) *"Expert" Interpretation of Narcotics Jargon*

Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States* v. *Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir.), *cert. denied*,

7 Even assuming *arguendo* that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization. Compare *United States* v. *Bynum*, 485 F.2d 490, 500-02 (2d Cir. 1973) with *United States* v. *Fino*, 478 F.2d 35 (2d Cir. 1973) and *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir. 1973).



410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

(d) *"Surprise" Disclosure of Venetucci Conversations*

Venetucci attacks the introduction at trial of two conversations between him and Sorrentino, which were intercepted shortly after the wiretap of Sorrentino's phone had begun on January 29, 1973. The basis for this objection is the failure of the prosecutor, Assistant U.S. Attorney Heinemann, to make any pretrial disclosure that these conversations had been intercepted.

Venetucci alleges that Heinemann represented to him on two occasions that none of the government's tapes or transcripts contained any conversation participated in by Venetucci. The first occasion was on May 17, 1973, when, in response to discovery motions, Heinemann agreed to furnish not only the wiretap orders with their supporting affidavits but also those transcripts of tapes that had actually been compiled, and to make all tapes and logs available for listening and inspection. Although Heinemann is alleged to have stated on that date that none of the government's tapes contained any Venetucci conversations, Heinemann did not recall having made any such statement. Before trial Heinemann, after stating that he expected all "of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel," furnished to Venetucci's counsel approximately 90 transcripts of tape recorded conversations, none of which contained any Venetucci conversations. The second occasion occurred after the trial had begun on July 9 when Venetucci's counsel moved for a mistrial on the ground that Heinemann had implied in his opening statement to

the jury that the government actually did have tapes of Venetucci's conversations which would incriminate him.[8] However, responding to the court's inquiry as to whether he meant to refer to wiretaps of Venetucci conversations, Heinemann had said "No, I don't think there is anything I said to indicate that."

Heinemann did not disclose that tapes of Venetucci conversations existed until the fifth day of appellants' trial when he informed the court that he had discovered the tapes on the previous evening in reviewing the logs kept during the Sorrentino wiretap. Heinemann subsequently offered, and the district court admitted, the transcripts and tapes of two conversations between Sorrentino and Venetucci which occurred on January 29, 1973 and on February 1, 1973, respectively, concerning their joint obligation to make up to Cirillo the $8,000 deficit resulting from the sale of the first lot of narcotics at $22,000 instead of the $30,000 which Venetucci was to pay for it. Venetucci argues that he was prejudiced by this delayed "bombshell" because (1) he was denied any opportunity to participate in a pretrial suppression motion and (2) his counsel was misled in the preparation of his own opening statement, where he emphasized that, despite the government's extensive electronic surveillance, no Venetucci conversation had been intercepted.

We agree with Venuetucci that the government should have produced the transcripts of his conversations with

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8 In moving for a mistrial, counsel for Venetucci referred to Heinemann's statement that:

> "Later it became clear exactly how much money was to be paid for the heroin that was brought to Sorrentino's mother's house that night (i.e. January 18). $30,000. And $10,000 was ultimately the payment that was demanded, Bobby Venetucci, as a sign of his good faith. This we know because the defendants talked about it on the telephone, and the telephone of Alphonse Cirillo during January, 1973, was under electronic surveillance by court order."

Sorrentino prior to trial in response to his explicit discovery requests, see *United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approxiately 200, contained any Venetucci conversations.

At least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel. Our review of these logs reveals that identification of each caller is neither difficult nor particularly time consuming. In each instance where a call was intercepted the log entry identified the parties (where identifiable) before giving a brief description of the conversation. Indeed, on the very third page of the Sorrentino logs there is a log entry, highlighted by two asterisks, which reads, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on. . . ." [9] (emphasis added). All counsel were at all times aware that "Bobby" and "Brother" were the nicknames for Venetucci and Sorrentino, respectively.

Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity

9 "MO Bobby, MI Brother" is shorthand for Male/Out (i.e., male calling from outside) to Male/In (i.e., male inside receiving call).

of the wiretap orders or on the conduct of the wiretap operation[10] borders on the frivolous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States* v. *Allsenberrie*, 424 F.2d 1209, 1215 (7th Cir. 1970); *Pierce* v. *United States*, 414 F.2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States* v. *Padrone*, 406 F.2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Sufficiency of the Evidence

Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of *non*-hearsay evidence that the latter was a party to the conspiracy. See *Glasser* v. *United States*, 315 U.S. 60, 74

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10 Venetucci asserts that his arguments against the wiretap would have been entirely different from those actually raised by the other defendants. He says he would have focused on the New York rather than the federal legislation (although the New York legislation was clearly authorized and conformed to the federal legislation), on the existence of probable cause for the first order (rather than its form) and the numerous extensions of the first order. We have considered these arguments but find them insufficient to change our already-expressed views.

(1942); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 387 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial, see *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964) ("mere meeting was no evidence [that persons were] conspirators") and *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) with *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

As to most defendants this threshold requirement as to admissibility of hearsay declarations of co-conspirators was clearly met. The tapes, transcripts, surveillance, and other circumstantial evidence provided overwhelming non-hearsay evidence of a conspiracy to distribute heroin in which Cirillo and Murphy were suppliers. Sorrentino was a middleman, and Venetucci and Cesare were customers. Lilienthal, Gutierrez and Gaber argue, however, that there was insufficient non-hearsay evidence to permit the trial court to find by a fair preponderance of the evidence, which is the governing standard, that they had intended to participate in either the January or March transactions. Therefore, they say, it was reversible error to permit the jury to consider the incriminating hearsay declarations of the other co-defendants as evidence against them.

(a) *Lilienthal*

The non-hearsay evidence of Lilienthal's participation in the March transaction was clearly sufficient to permit the introduction of statements by co-conspirators in furtherance of the conspiracy. The principal item was Lilienthal's devastatingly incriminatory telephone conversation with Cirillo on March 15 in which Cirillo asked "I got to—I got to have it before the income tax is filled out. You got the paper that I half filled out?" (i.e., have you got the half kilo of heroin?), to which Lilienthal responded "Oh yeah, yeah, yeah," and advised Cirillo that he would stop by in about an hour. In a short while Lilienthal left his residence and later in the day his car was seen at Cirillo's house. Shortly after Lilienthal's visit to Cirillo's house, Cirillo and Murphy went to the White Castle parking lot near Sorrentino's house where they had failed to appear on the previous night because Cirillo had been unable to communicate to Lilienthal his request for those "half filled out" income tax forms (i.e., the half kilo of heroin). When they arrived at the parking lot Cirillo and Murphy were arrested and a package containing a half kilo of heroin was discovered on Cirillo.

From this non-hearsay evidence, including Lilienthal's own statements and conduct, the jury could infer that he agreed to and did supply to Cirillo the half kilo of heroin needed for sale in the chain of distribution. The court acted properly, therefore, in admitting hearsay statements of co-conspirators made in furtherance of the conspiracy, including Cirillo's "statement to Sorrentino" during the aborted January transaction that "Teddy" (Lilienthal) was a supplier who was always a "million percent, nothing ever goes wrong" and another statement by Cirillo to Sorrentino before the March transaction to the effect that "my friend Ted [has] got some papers for you," (i.e., some heroin).

These statements confirmed the non-hearsay evidence surrounding the meeting and warranted the jury's finding beyond a reasonable doubt that Lilienthal was a member of the conspiracy and a participant in the March transaction. See *United States* v. *Manfredi*, —— F.2d —— (2d Cir. Nov. 23, 1973), Slip Opin. 5593; *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

(b) *Gutierrez*

Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators. The only independent non-hearsay evidence of Gutierrez's possible participation in the conspiracy related to the aborted January, 1973, transaction. On January 18th Venetucci, immediately after leaving his rendezvous with Cirillo, Murphy and Sorrentino at Sorrentino's mother's apartment, for two hours visited Gutierrez's home. At the conclusion of that meeting Venetucci drove back to rejoin Cirillo, Murphy and Sorrentino. On January 22nd Venetucci visited with Gutierrez for four hours at the dress store of the latter's wife, with an interruption when Venetucci left and then returned only after checking for surveillance. Venetucci finally departed, driving evasively to Staten Island. There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of narcotics by Gutierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the court to find by a fair preponderance that he had participated.

While the two visits raise suspicion, suspicion is not enough. For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become

a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits. Relying on *United States* v. *Manfredi, supra,* the government contends that in addition to Venetucci's visits there was circumstantial evidence in the form of "verbal acts" by Sorrentino that showed Gutierrez's participation in the conspiracy. It is true that in several Sorrentino-Cirillo telephone conversations Sorrentino referred to "Frankie" Venetucci's "partner." But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible. Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof.

Although *Manfredi* went quite far in admitting "verbal acts" of a co-conspirator, it is clearly distinguishable from the present case and cannot be expanded to admit Sorrentino's hearsay statements. In *Manfredi* the statements were those of the defendant Joseph LaCosa regarding *his own personal relations* with Manfredi as a narcotics supplier and could be coupled with his own evasive personal conduct upon the occasion of his visits to Manfredi's home. We treated LaCosa's statements as circumstantial evidence because they represented the declarant's *personal knowledge.* When added to the other corroboratory cir-

cumstances we concluded that they had a "ring of reliability." Compare *Manfredi* with *United States* v. *D'Amato*, —— F.2d —— (2d Cir. March 14, 1974), Slip Opin. 2199, 2205-08. No such "ring of reliability" exists here. In the first place the statements relied upon by the government are not those of Venetucci with respect to his personal dealings with Gutierrez, which might conceivably fit within *Manfredi*, but statements of Sorrentino, who had no personal relationship at all with Gutierrez. For all we know Sorrentino may have been basing his description of Gutierrez as Venetucci's "partner" on rumors that he had heard from persons other than Venetucci. To admit such rank "double hearsay" as "circumstantial evidence" or "verbal acts" would be to make a mockery of the "non-hearsay" threshold requirement.

The danger inherent in permitting such hearsay to be used as the basis for admitting still more hearsay declarations of co-conspirators is rather obvious. Aside from the lack of opportunity to cross-examine the declarant and the obvious second-hand nature of Sorrentino's statements, out-of-court statements by Venetucci himself were introduced which suggested that Gutierrez had not agreed to participate in the narcotics scheme. Thus, in a conversation with Sorrentino on February 1, 1973, with respect to obtaining a loan to make up the $8,000 deficit in the price ultimately secured by Cirillo for the narcotics which Venetucci had agreed to buy, Venetucci expressly denied any understanding that "Frankie" was to share in payment of the deficit.

It may be that the "non-hearsay" threshold requirement for admission of hearsay declarations of co-conspirators, which had been liberalized through a series of modifications since its inception, compare *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942), and *United States* v. *Pugliese*, 153 F.2d 497,

500 (2d Cir. 1945), with *United States* v. *Geaney, supra,* will be relaxed even further to permit introduction of certain statements of co-conspirators regardless of their unavailability for cross-examination, subject to conditions that will be deemed sufficient to guarantee their trustworthiness. See Proposed Rules of Evidence for the United States District Courts and Magistrates, Rules 803(1)-(2). Until such a change is made, however, we must adhere to the standing rule which requires us to exclude hearsay where the threshold test has not been made.

Since the proof of Sorrentino's statements as to the reasons for Venetucci's visit to Gutierrez was inadmissible as evidence of Gutierrez's participation, the trial court could not properly consider it in applying the "fair preponderance" test with respect to Gutierrez. Cf. *Dutton* v. *Evans,* 400 U.S. 74, 88 (1970); *General Tire of Miami Beach, Inc.* v. *NLRB,* 332 F.2d 58, 61 (5th Cir. 1964). In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt. See *United States* v. *Fantuzzi,* 463 F.2d 683, 689-90 (2d Cir. 1972); *United States* v. *Cimino,* 321 F.2d 509-10 (2d Cir. 1963), *cert. denied,* 375 U.S. 974 (1964); *United States* v. *Bentvena,* 319 F.2d 916, 949 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963); *United States* v. *Stromberg,* 268 F.2d 256, 267 (2d Cir.), *cert. denied sub nom. Lassa* v. *United States,* 361 U.S. 863 (1959). See also *United States* v. *Glover,* 306 F.2d 594 (10th Cir. 1962).

(c) *Gaber*

The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's

presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test.[11] See *United States* v. *Fantuzzi, supra; United States* v. *Cimino, supra,* and other decisions cited on page 3316.

The decisions relied upon by the government do not support its argument that there was sufficient non-hearsay evidence of Gaber's membership in the conspiracy to admit the hearsay declarations of alleged co-conspirators. In *United States* v. *Calabro*, 449 F.2d 885 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971), in affirming a narcotics conviction, we regarded "of critical importance" the fact that the defendant, who had been present at several meetings between the seller and the intended customer, an undercover agent, carefully scrutinized the agent and at one point actually frisked him.[12] And in *United States* v. *Ragland*, 375 F.2d 471, 473 (2d Cir. 1967), we upheld the admission of hearsay evidence against a defendant only after noting

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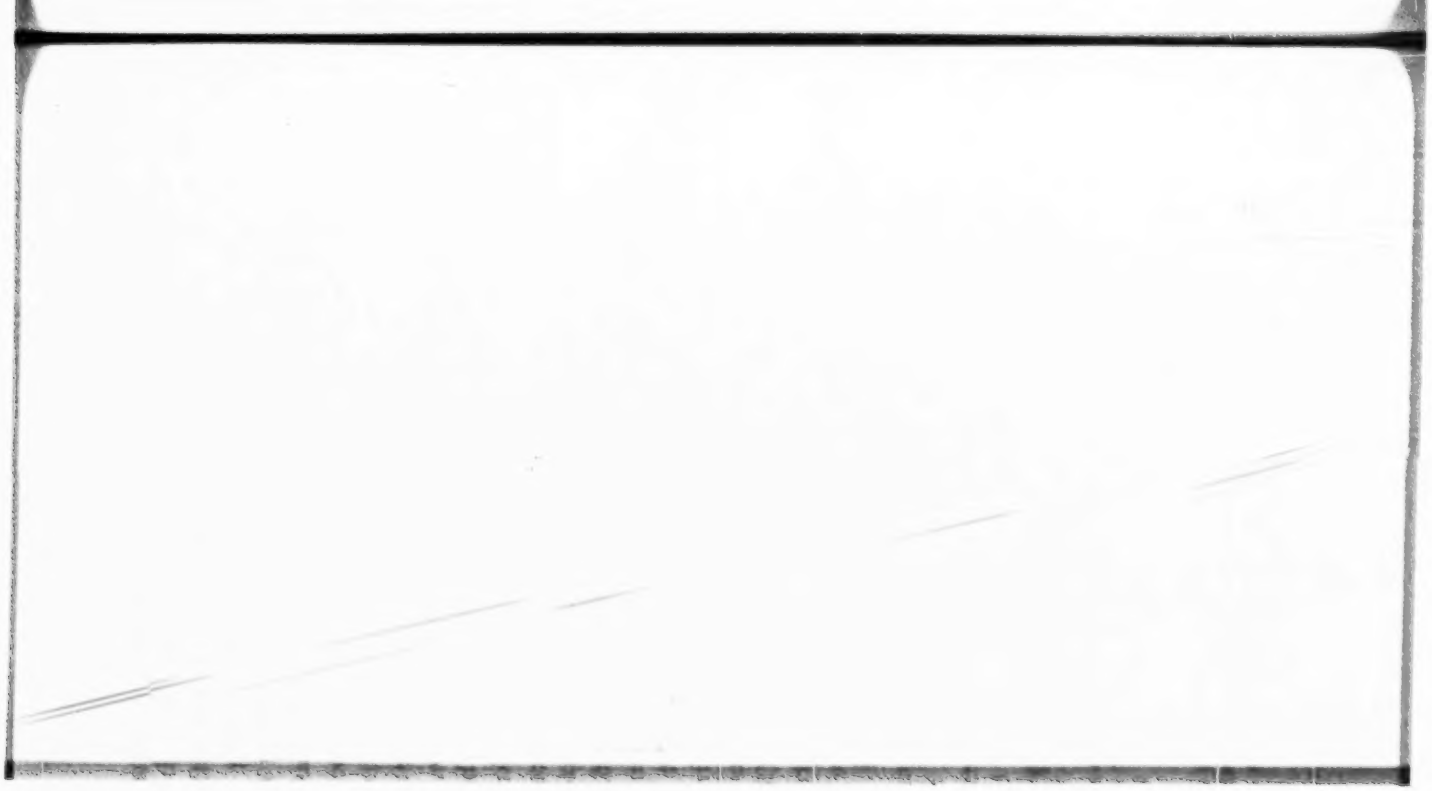
11 Cesare's statement in one of his March 14 telephone conversations with Sorrentino to the effect that he (Cesare) had "Gabe" (Gaber) with him added nothing to the government's proof of guilty knowledge on the part of Gaber.

12 It was not actually clear from the evidence that the defendant himself frisked the undercover agent. The frisking occurred when the agent was standing at the urinal in a restaurant's men's room as the defendant and his colleague passed behind him.



that a co-defendant had not only used the "slanguage" of narcotics dealings *in the defendant's presence* but had also explicitly referred to "narcotics." Compare *Calabro* and *Ragland* with *Ong Way Jong* v. *United States*, 245 F.2d 392 (9th Cir. 1957) (conviction reversed although defendant was constantly with co-defendant who sold narcotics): *Glover* v. *United States*, 306 F.2d 594 (10th Cir. 1962) (conviction reversed although defendant seen in vicinity of narcotics transaction between co-defendant and undercover agent) and *People* v. *Garcia*, 201 Cal. App. 2d 589, 20 Cal. Reptr. 242 (1962) (conviction reversed although defendant present at time of narcotics sale).

Since the government failed to adduce sufficient non-hearsay evidence of Gaber's participation in the conspiracy, his conviction must be reversed.

Variance Between Proof and Indictment

Venetucci, Lilienthal and Cesare[13] advance the argument, frequently asserted in conspiracy cases, see *United States* v. *Borelli*, 336 F.2d 376, 380 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), that even assuming the involvement of each in one of the two transactions, the evidence showed two independent conspiracies, one in January and the other in March, 1973, rather than the single on-going conspiracy alleged. The issue turns on whether the proof warranted an inference that each of the three, in dealing with a member of the core group (Cirillo, Murphy and Sorrentino), was aware of, and thus knowingly furthered, the core group's overall on-going venture or partnership. See *Borelli*, *supra* at 385. Although a single transaction with, or function performed

13 Gutierrez and Gaber also complain of a variance as to them but we need not consider these claims since we have already concluded that the evidence was insufficient to connect them with either the January or March transaction.

for, a representative of the core group may under some circumstances be insufficient to warrant an inference of knowledge of the extensive nature of the core group's activities, see *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), we have recognized that it is "not an arbitrary rule which is to be applied rigidly and without reason." See *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Indeed, just recently we said that "it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

We are not here confronted, however, with merely a single delivery or purchase on the part of each of these three appellants (Venetucci, Lilienthal and Cesare) which, without more, might not support knowledge of a broader conspiracy, see, e.g., *United States* v. *DeNoia*, *supra*, but with deeper involvement on the part of each of these participants. Venetucci met on at least two occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

In the cases of Lilienthal and Cesare the evidence shows, in addition to their participation in a transaction involving a large quantity, that they used narcotics code language in their dealings, Lilienthal making a delivery of a half kilo in response to Cirillo's request for "half-filled out" income tax papers and Cesare negotiating for the "sample of the dress." From these circumstances, including their use of pre-arranged code language, the jury could infer knowledge that they were participating in a continuing major business which extended in scope beyond the particular transaction and depended for its success upon a chain of distribution in which each principal played an essential part. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967).

Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States*, 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that "[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence . . . as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators." In *Blumenthal* v. *United States*, 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a sim-

ilar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.

Miscellaneous Other Points

(a) *The Contents of the Paper Bag*

Sorrentino argues that his conviction on Count 2 (distribution of one kilogram of heroin on January 18, 1973) must be reversed since the government offered no direct proof that the paper bag carried by Cirillo to the meeting with Murphy, Sorrentino and Venetucci at Sorrentino's mother's apartment on the evening of January 18 contained heroin. We disagree. There was ample circumstantial evidence that the bag contained heroin. The delivery of the bag was the result of Sorrentino-Cirillo telephone negotiations in narcotics jargon and was followed by angry discussions regarding Venetucci's failure to deliver the "thirty," (e.g., $30,000), the approximate going price for a 50% pure kilogram of heroin. Later Cirillo and Sorrentino agreed to get the "dress" (i.e., narcotics) off Venetucci.

(b) *The Introduction of the Cocaine Found on Murphy and Cirillo*

Appellants Murphy and Cirillo argue that the trial court should not have permitted the government to introduce the small quantities of cocaine found on them at the time of their arrest (in addition to the half kilogram of heroin found on Cirillo) since it was evidence of crimes other than those charged in the indictment. But here the cocaine was relevant to refute the position which the government could anticipate and which counsel for Cirillo actually tried to establish during cross-examination of government witnesses, i.e., that the heroin was planted on Cirillo as a frame-up by the arresting officers. See *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973); *United States* v.

Wright, 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In any event admission of the cocaine as evidence of guilty knowledge on the part of Cirillo and Murphy was well within the trial court's wide discretion. See *United States* v. *Deaton*, 381 F.2d 114, 117-19 (2d Cir. 1967).

(c) *The Jury Charge*

During his charge to the jury the trial judge instructed that they should consider the wiretap evidence since he had determined that the wiretap orders were properly issued. "If I am wrong," he continued, "somebody else can reverse me, but you are bound to take my view of the law." Appellants Murphy and Cirillo argue that this statement, to which they excepted, impermissibly tended to establish a similar train of thought in the minds of the jurors—i.e., if they should render an erroneous verdict, someone else would reverse them. The unnecessary remark is confusing and conceivably could be interpreted several ways. However, even accepting the interpretation given to it by appellants, we are satisfied that under the circumstances of this case it was clearly harmless, in view of the overwhelming evidence against Murphy and Cirillo, including the tapes, visual surveillance and arrest with a large quantity of narcotics in their possession.

Conclusion

The convictions of appellants Gutierrez and Gaber are reversed. All other convictions are affirmed.

PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 73-2426 September Term, 1973

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT VENETUCCI, et al,

Defendants-Appellants.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Robert Venetucci, the defendant-appellant abovenamed, by Robert A. Fried, Esq. of the office of Jacob P. Lefkowitz, Esq., presents this, his petition for a rehearing in the above-entitled cause, and, in support thereof, respectfully shows:

I

It is simply not true that as this Court states "at least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel" (p. 3314). The correct sequence of events, insofar as concerns Mr. Venetucci, is as follows:

1. On May 17, at 2:10 p.m., I first ment with Mr. Guy L. Heinemann, Assistant United States Attorney, at his office for

the purposes of pre-trial discovery (see affirmation of Robert A. Fried, dated July 17, 1973, in support of defendant's oral motion to preclude, attached hereto as Exhibit 'A'). In addition to the representations made (as detailed in Exhibit 'A') counsel was also informed that the logs, though not available at that time, would be sent to counsel as they became available. Further, counsel was also informed that the wiretap orders and affidavits in support had already been mailed to this office. However, after several days and several phone calls to Mr. Heinemann's secretary, as of May 29, 1973 the material had not yet arrived.

2. Finally, subsequent to May 29, 1973, and on or about June 5, 1973, this office received copies of all wiretap orders, applications and affidavits, and copies of transcripts of ninety conversations (all the conversations that had been represented as "pertinent" and which the government intended for use at trial). Accompanying these materials was a letter by Mr. Heinemann, dated May 29, 1973, attached hereto as Exhibit 'B'. This letter indicated that copies of the logs of the wiretap interceptions "will be provided to assist counsel". Thus, it is clear that as of the above dates, the copies of the logs had not yet been provided, as had been promised earlier.

3. On or about June 12, 1973, Mr. Venetucci and I (in addition to other counsel) were present at the United States Courthouse for the Eastern District in order to meet with Mr. Heinemann and to view the video tapes (referred to in Exhibit 'B'). At that time it was expected

that copies of the logs were to be provided to defense counsel. However, as is stated in the Brief for the appellee at p. 10, the copies of the Sorrentino and Cirillo logs were not completed until June 15, 1973.

4. Several days subsequent to June 15, 1973, this office received copies of two letters from Mr. Heinemann, dated June 15, 1973, to Harold Borg, Esq. (attached hereto as Exhibit 'C') and to the Hon. Orrin G. Judd, respectively (attached hereto as Exhibit 'D'). The letter to Mr. Borg states that a copy of the Cirillo wiretap log is enclosed and that "Happily this time the Xerox reproduction was quite good. Only a few pages appear beyond legibility". Insofar as this office is aware, no copies of any other logs were sent to any other defense counsel; however, I do believe that Arnold E. Wallach picked up a copy of the Sorrentino logs sometime during the June 12 to June 20th time period. (This belief is based upon a telephonic communication I had with Mr. Wallach on or about May 20, 1974 in preparing this petition.)

5. It is clear from the above that the logs herein were not readily available to defense counsel "two and a half months before trial". In fact, they were never "readily" available, and in any enent, they were certainly not available to counsel for Venetucci until long after they would have been needed for a suppression motion based upon minimization. Further, this Court is already aware that such motion was not contemplated because based upon the representations of Mr. Heinemann and counsel's study of the transcripts herein, it was clear that Mr. Venetucci had no standing to make such motion (see also II, infra).

6. It is curious that neither Mr. Heinemann, who had easy access to the logs in preparing his reply to the suppression motions of the other counsel herein, nor the trial court which received the logs (see Exhibit 'D') in order to decide those motions never discovered the entry concerning "Bobby" (a common nickname for all Roberts).

II

While it appears that there is some doubt in the mind of this Court as to whether or not Mr. Heinemann "categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations", there is no doubt in my mind that Venetucci's non-appearance on those tapes was made clear to me, not only on May 17, but subsequently (see Exhibit 'A'). While it is admitted that Mr. Heinemann did not state, "I absolutely, unequivocally guarantee that your client's conversations are not to be found in any of the tapes", I now state, for the record, that at no time was I informed by the Assistant United States Attorney that he began this case with minimal preparation and was not totally familiar with the evidence herein (see Brief for the appellee, pp. 27 and 28) or given any constructive notice in any manner whatsoever that was not positive as to his statements and that I had better listen to the tapes themselves in order to discover whether he may have missed something pertaining to Mr. Venetucci. If Mr. Heinemann had stated that he was uncertain or that he had not completely reviewed his own material the situation might have been different.

However, under the circumstances herein, it is incredible to require any attorney to listen to "3,700" hours (the government's figure, see note ** p. 27 Brief for the appellee) of wiretap conversation, after having been informed his client's conversations were not contained therein, in order to discover if the Assistant United States Attorney or his agents did their homework,especially without any notice from the Assistant United States Attorney to that effect.

III

Certainly, the delayed disclosure of the wiretap conversation, occurring after defendant's counsel assured the jury that the defendant was not to be found on the tapes("no evidence whatsoever, whatsoever, will be presented against Robert Venetucci except jingle bells. He (the prosecutor in his opening) mentioned half a dozen times or more about wiretap telephone conversations. Not of my client." (Tr. 52)) could affect the vital decision on the part of a defendant whether or not to take the stand where that defendant's own voice could be a contradiction of his counsel's opening statement.

Further, one fails to see in what manner an instruction could have been phrased in order to cure the "apparent contradiction" in counsel's opening statement that would not have further prejudiced this issue; especially as it is clear that up until that point, the only information connecting Mr. Venetucci with this matter was that his name was Robert (however, the transcripts spoke of a Bobby the Greek and Mr. Venetucci is of Italian ancestry) and he was acquainted with some of the other defendants.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

s/
ROBERT A. FRIED for
Jacob P. Lefkowitz, Attorney
for Petitioner and Defendant-
Appellant Robert Venetucci

I, Robert Aron Fried, an attorney associated with Jacob P. Lefkowitz, attorney for Robert Venetucci, do hereby certify: 1) that the foregoing petition is true, except as to those matters stated to be upon information and belief and as to those matters I believe the statements to be true. 2) I have been informed, in conversations with the other attorneys herein having knowledge of the above facts, that the facts herein contained contained can be further verified, if required, by affidavits from those attorneys, and 3) That the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

Dated: New York, New York
May 20, 1974

s/
ROBERT A. FRIED

EXHIBIT A - AFFIRMATION DATED JULY 17, 1973
ANNEXED TO PETITION FOR REHEARING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILLINETHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants.

ROBERT A. FRIED, an attorney duly admitted to practice before this Court, affirms the following to be true under the penalties of perjury:

I am an attorney-at-law associated with JACOB P. LEFKOWITZ, attorney for defendant ROBERT VENETUCCI. On May 16, 1973, I served upon the United States Attorney's Office a copy and filed with this Court certain pre-trial motions for discovery and inspection and for a bill of particulars. Pursuant to the rules of this Court, this affirmant on May 17, 1973, met with Assistant United States Attorney Guy L. Heinemann at his office located at the Federal Building, Cadman Plaza East, Brooklyn, New York concerning the above-mentioned pre-trial motions. At this conference I was informed, pursuant to Numbers 1(a), 3(a)(b), and (c) and 4(p)

and (q) of said motions that the Government had obtained information relevant to the instant prosecution by the use of Court authorized wiretaps and that defense counsel would be furnished with the court order, the logs of such interceptions and transcripts of all the conversations that the government intended to use in this matter. In addition, the tapes of such interceptions were available for listening and/or duplicating (see attached letter "Exhibit A" in confirmation). I was further informed that none of the tapes contained any conversation purported to be that of the defendant Robert Venetucci. This was confirmed when the transcripts were made available; that is, none of the transcripts furnished to defense counsel pursuant to defendant's motions contained any conversation alleged to be that of the defendant Robert Venetucci. This was again confirmed by Assistant United States Attorney Heinemann on July 10, 1973 at p. 67 of the trial minutes:

"THE COURT: Mr. Heinemann, tell me about this remark about the wiretap. Did you mean to say there are wiretaps of Venetucci?

Mr. Heinemann: No, I don't think there is anything I said to indicate that..."

A defendant is entitled to know whether any statements of his were seized or obtained through electronic surveillance, and the substance of such statements so the appropriate motions can be made and to avoid prejudicial surprise at trial. This was not done here. Accordingly, defendant requests that such conversation be precluded.

Legal support for the oral motion to preclude is set forth in the accompanying memorandum of law.

Dated: New York, New York
July 17, 1973

s/
ROBERT A. FRIED

EXHIBIT B - LETTER DATED MAY 29, 1973
ANNEXED TO PETITION FOR REHEARING

United States Department of Justice

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

SPECIAL DELIVERY

May 29, 1973

Jacob Lefkowitz
150 Broadway, Suite 1401
New York, N.Y. 10038

Re: United States v. Alphonse Cirillo, et al. 73 CR 352

Dear Sir:

I have been informed by Judge Judd's Law Clerk that the suppression motions in the above-captioned case will be heard either on June 4th or 5th, 1973.

Copies of all of the tapes for both court-ordered wire interceptions are available for listening and/or duplicating at the office of Martin Hershey, Chief, Narcotics Section, Brooklyn District Attorney's Office. Please contact Mr. Hershey to make arrangements at 643-8096. Copies of the logs of these interceptions will be provided to assist counsel.

On this date, I expect transcripts of all of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel.

Please agree among other defense counsel as to a convenient time at which a video tape of a meeting among the defendants Cirillo, Murphy, Venetucci, and Sorrentino can be viewed.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By s/ Guy L. Heinemann/de
Guy L. Heinemann
Assistant U.S. Attorney

cc: Hon. Orrin G. Judd
United States District Judge
Eastern District of New York

Dictated but not signed s/ Guy L. Heinemann/de

EXHIBIT C - LETTER DATED JUNE 15, 1973
ANNEXED TO PETITION FOR REHEARING

United States Department of Justice

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

June 15, 1973

Harold Borg, Esq.
123-60 83rd Avenue
Kew Gardens, New York

Re: United States v. Alphonse Cirillo, et al. 73 CR 352

Dear Mr. Borg:

Enclosed please find in chronological order a copy of the daily log sheets for the Court-authorized wiretap on your client's telephone. Happily, this time the Xerox reproduction was quite good. Only a few pages appear to be beyond legibility. When you need to look at those pages, please contact me to use my copy or contact Assistant District Attorney Martin Hershey to use his copy.

It is my understanding that you will share this copy with all other defense counsel.

I am also arranging to have marked as exhibits my copy of both the Cirillo and Sorrentino wiretap logs.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By s/ Guy L. Heinemann
Guy L. Heinemann
Assistant U.S. Attorney

Enc.

cc: Hon. Orrin G. Judd
U.S. District Judge
Eastern District of N.Y.

Arnold E. Wallach, Esq.
253 Broadway
New York, New York

Martin Stewart, Esq.
118-21 Queens Blvd.
Kew Gardens, New York

Jacob Lefkowitz, Esq.
150 Broadway
Suite 1401
New York, New York

Paul Warburg, Jr., Esq.
Chanin Building
122 East 42nd Street
New York, New York

William Sperling, Esq.
125-10 Queens Blvd.
Kew Gardens, New York

Arnold M. Gelman, Esq.
32 Court Street
Brooklyn, New York

William Simon, Esq.
2749 Atlantic Avenue
Brooklyn, New York

EXHIBIT D - LETTER DATED JUNE 15, 1973
ANNEXED TO PETITION FOR REHEARING

United States Department of Justice

BY HAND

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N. Y. 11201

June 15, 1973

Honorable Orrin G. Judd
U. S. District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Alphonse Cirillo, et al. 73 CR 352

Dear Judge Judd:

As directed by Your Honor on June 12, 1973, I am enclosing herewith copies of the logs for the Sorrentino and Cirillo wiretaps in the above-captioned case.

I respectfully request that they be marked as Court exhibits and returned to me for safekeeping.

Respectfully,

ROBERT A. MORSE
United States Attorney

By s/ Guy L. Heinemann
Guy L. Heinemann
Assistant U.S. Attorney

Enc.

cc: Harold Borg, Esq.
Arnold E. Wallach, Esq.
Martin Stewart, Esq.
Jacob Lefkowitz, Esq.
Paul Warburg, Jr., Esq.
William Sperling, Esq.
Arnold M. Gelman, Esq.
William Simon, Esq.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of June, one thousand nine hundred and seventy-four.

Present:

HON. HAROLD R. MEDINA
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ALPHONSE CIRILLO, a/k/a "Fuzzy", VINCENT MURPHY, a/k/a "Murph", SALVATORE SORRENTINO, a/k/a "Brother", ROBERT VENETUCCI, a/k/a "Bobby", FRANCISCO GUTIERREZ, a/k/a "Frankie", THEODORE ALFRED LILIENTHAL, LAWRENCE CESARE, a/k/a "Larry", and ABE GAVER, a/k/a "Gave",

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant, Robert Venetucci,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
FILED

JUN 5 1974
A. DANIEL FUSARO, CLERK

SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1832

ALPHONSE CIRILLO AND VINCENT MURPHY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-1837

THEODORE ALFRED LILIENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1859

SALVATORE SORRENTINO AND LAWRENCE JOHN CESARE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-1987

ROBERT VENETUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Cirillo Pet. App. A)[1] is reported at 499 F. 2d 872. The opinion of the district court (Cirillo Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1974. Petitioner Venetucci (No. 73–1987) filed a petition for rehearing, which was denied on June 5, 1974; his petition for a writ of certiorari was filed on July 5, 1974. Petitions for writs of certiorari in Nos. 73–1832 (Cirillo and Murphy) and 73–1837 (Lilienthal) were filed on June 6, 1974. The petition in No. 73–1859 (Sorrentino and Cesare) was not filed until June 7, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, a technical defect in the initial order authorizing electronic surveillance, namely, the absence of a directive to minimize the interception of innocent conversations, requires suppression of the evidence obtained through electronic surveillance (raised in Nos. 73–1832, 73–1837, and 73–1859).

---

[1] References to the various petitions and their respective appendices will be identified by the petitioners' names, *e.g.*, "Cirillo Pet."; "Cirillo Pet. App."

2. Whether, in light of the government's unchallenged *prima facie* showing that the wire interception orders in fact had been properly executed in such a manner as to minimize the interception of innocent conversations, the trial court erred in failing to conduct an evidentiary hearing on that question (raised in Nos. 73–1832 and 73–1859).

3. Whether it was error for the district court to permit a government witness, whose qualifications as an expert were not questioned, to testify about the meaning of narcotics jargon used by petitioners (raised in Nos. 73–1859 and 73–1987).

4. Whether petitioner Venetucci was prejudiced by the failure of the government to make pretrial disclosure of intercepted conversations to which petitioner was a party and which were introduced at trial (raised in No. 73–1987).

5. Whether there was a variance between the government's evidence and the conspiracy charged in the indictment (raised in No. 73–1987).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, all petitioners were convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846 (Count 9). In addition, petitioners Cirillo and Murphy were each convicted of one count of possession of one kilogram of heroin with intent to distribute that substance

(Count 1), one count of distribution of the same kilogram of heroin (Count 2), and one count of attempted distribution of one-half kilogram of heroin (Count 7), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Sorrentino was also convicted on the same counts of distribution and attempted distribution (Counts 2 and 7). Petitioner Venetucci was convicted on separate counts of possession of the same kilogram of heroin with intent to distribute (Count 3), and of attempted distribution (Count 4), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Lilienthal was convicted of one count of possession of the one-half kilogram of heroin with intent to distribute (Count 5) and of one count of distribution of the same heroin (Count 6), in violation of 21 U.S.C. 841 (a)(1). Petitioner Cesare was convicted of attempted possession of the one-half kilogram of heroin (Count 8), in violation of 21 U.S.C. 846 (Cirillo Pet. App. 49–50).[2]

[2] Petitioners were sentenced as follows (Cirillo Pet. App. 49–50, n. 1):

Cirillo—Concurrent terms of 14 years' and 9 months' imprisonment on Counts 1 and 2, with a 10-year special parole term; concurrent terms of 10 years' imprisonment on Counts 7 and 9, to run consecutively with the sentence imposed on Counts 1 and 2, to be followed by a 10-year term of special parole; and a fine of $10,000 on Count 9.

Murphy—Concurrent 10-year terms of imprisonment on Counts 1, 2, 7, and 9, to be followed by a special parole term of 7 years, and a fine of $5,000 on Count 9.

Sorrentino—Concurrent 10-year terms of imprisonment on Counts 2, 7, and 9, to be followed by a special parole term of 7 years, and a fine of $5,000 on Count 9.

Venetucci—Concurrent terms of 9 years' imprisonment on Counts 3, 4, and 9, to be followed by a special parole term of 7 years.

The evidence at trial is reviewed in detail in the lengthy opinion of the court of appeals (Cirillo Pet. App. 51–56). It shows that on January 18, 1973, Cirillo, Murphy and Sorrentino, acting in concert, delivered about one kilogram of heroin to petitioner Venetucci. Problems developed when Venetucci was unable to produce the purchase money for the narcotics, and eventually Venetucci was forced to return the heroin. On January 29, 1973, Sorrentino informed Venetucci that the heroin had been sold at a "loss" of $8,000 and that Venetucci and his "partner" would have to pay that amount to Cirillo (Cirillo Pet. App. 51–54).

On March 9, 1973, Sorrentino advised Cirillo that he had a prospective customer (Cesare) for a quantity of heroin, which was to be provided by Lilienthal. Delivery of a half kilogram of heroin to Cesare was planned for March 14, 1973, but the plan was aborted when Sorrentino and Cirillo could not locate their supplier, Lilienthal. On the following day, delivery was attempted again, but Cirillo and Murphy were arrested as they prepared to rendezvous with Sorrentino. At the time of their arrest, Cirillo and Murphy had a half kilogram of heroin and a small quantity of cocaine in their possession (Cirillo Pet. App. 54–56).

The government's proof consisted largely of tape recordings and transcripts of some 40 intercepted con-

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Lilienthal—Concurrent terms of 8 years' imprisonment on Counts 5, 6, and 9, to be followed by a special parole term of 5 years, and a fine of $2,500 on Count 9.

Cesare—Concurrent terms of 5 years' imprisonment on Counts 8 and 9, to be followed by a special parole term of 5 years.

versations occurring over the home telephones of Cirillo and Sorrentino, as well as the testimony of surveilling agents and a video tape of a meeting of four of the conspirators (Cirillo Pet. App. 51). Initial authorization for the wire interception of Cirillo's telephone was given in a warrant issued on October 31, 1972, by a Justice of the New York State Supreme Court, pursuant to the New York State eavesdropping statute, 11–A McKinney's Consolidated Laws of New York, Criminal Procedure Law, Sec. 700.05, *et seq.* The initial order was extended to authorize four additional 30-day periods of surveillance. The initial authorization for the interception of Sorrentino's telephone was issued on January 25, 1973, pursuant to the New York statute by a different New York State Supreme Court Justice. This authorization was extended for two additional 30-day periods (*ibid.*).

ARGUMENT

1. Petitioners contend that the absence of a directive concerning the minimization of interception of innocent conversations in the initial order authorizing the wire interception on Cirillo's telephone requires the suppression of evidence seized as a result of that, and subsequent, interceptions in this case[3] (Cirillo Pet. 14–34; Lilienthal Pet. 4–7; Sorrentino Pet. 6–11).[4]

[3] Since conversations intercepted during this initial interception period were relied on in establishing cause to issue the subsequent extensions, as well as the orders authorizing electronic surveillance of Sorrentino's telephone, the subsequent evidence, the court of appeals concluded, would presumably be "tainted" by the primary illegality (Cirillo Pet. App. 57, n. 3).

[4] Petitioners Lilienthal, Cirillo and Murphy also challenge the constitutionality of wire interceptions *per se*, as well as of

The initial warrant authorizing electronic surveillance of Cirillo's telephone was issued pursuant to the New York State eavesdropping statute, McKinney's CPL, *supra.*, Sec. 700.05, *et seq.* Section 700.30(7) of that statute requires, *inter alia*, that an "eavesdropping warrant must contain"

> [a] provision that [interceptions pursuant to] the authorization to intercept shall * * * be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article * * *.[5]

(Lilienthal Pet. App. 53–54). The warrant authorizing the initial Cirillo interception did not contain such a provision (Cirillo Pet. App. 87–90), although the orders authorizing the subsequent extensions did.[6]

The question of the validity of the warrant in question, which was issued pursuant to a state statute, is

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the New York eavesdropping statute in particular. Such an argument is without merit. See *United States* v. *Tortorello*, 480 F. 2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Cafero*, 473 F. 2d 489 (C.A. 3), certiorari denied, No. 72-1304, May 28, 1974; *United States* v. *Bobo*, 477 F. 2d 974 (C.A. 4), petition for a writ of certiorari pending, No. 73-231; *United States* v. *Cox*, 462 F. 2d 1293 (C.A. 8); *United States* v. *Cox*, 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *James*, 494 F. 2d 1007 (C.A.D.C.), certiorari denied, Nos. 73-6891 and 74-40, November 18, 1974.

[5] This section of the New York statute is basically a restatement of the minimization requirement of the federal statute, 18 U.S.C. 2518(5) (Lilienthal Pet. App. 48).

[6] The fact that all of the subsequent orders contained a minimization directive indicates that the absence of such a provision in the initial warrant was an inadvertent error of omission.

clearly a question of state law. *United States* v. *Manfredi*, 488 F. 2d 588, 598 (C.A. 2), certiorari denied, No. 73-1364, June 3, 1974. The New York decisions do not provide any definite guidance in determining the validity of a warrant in which the directive to minimize has been omitted. *Ibid.* Under federal law, however, in factual contexts similar to that presented by this case, such an omission has been viewed as a purely technical defect in the form of the warrant, not requiring suppression of the evidence obtained. See *United States* v. *Manfredi, supra; United States* v. *Rizzo*, 492 F. 2d 443, 446 (C.A. 2), certiorari denied, No. 73-6377, June 10, 1974; cf. *United States* v *Poeta*, 455 F. 2d 117, 121 (C.A. 2), certiorari denied, 406 U.S. 948.[7] The court of appeals properly followed this approach here, noting that while the initial warrant failed to contain a minimization directive, "there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it" (Cirillo Pet. App. 58).

The significant question in a minimization case is not whether the court order contained a directive to minimize but whether the electronic surveillance by the agents was *in fact* "conducted in such a way as

[7] In 18 U.S.C. 2518(10)(a)(ii), Congress provided the remedy of suppression of intercepted conversations where "the order of authorization or approval under which it was intercepted is insufficient on its face * * *." However, it was not the intent of Congress "to press the scope of the suppression rule beyond present search and seizure law" by requiring suppression of evidence for any technical irregularity in a warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 96.

to minimize the interception of communications not otherwise subject to eavesdropping * * *." McKinney's CPL, *supra*, Sec. 700.30(7). Such a determination "requires an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time of interception." *United States* v. *Scott*, C.A.D.C., No. 71-1702, June 27, 1974, slip op., p. 8. See also *United States* v. *James*, *supra*, 494 F. 2d at 1018-1023. Of course, the reasonableness of the agents' conduct depends upon the facts and circumstances in each case and must be assesed in light of what appeared to the agents at the time they were monitoring the conversations (*United States* v. *James*, *supra*, 494 F. 2d at 1022); "there is patently no mechanical, hard and fast formula applicable." *United States* v. *Bynum*, 485 F. 2d 490, 500 (C.A. 2), vacated and remanded on other grounds, No. 73-856, May 28, 1974. The degree of minimization required and the adequacy of minimization thus may turn on the scope of a narcotics conspiracy and the degree of circumspection used by the conspirators in their telephone conversations, including the use of code words, narcotics jargon and guarded language, as well as "the deliberate discussion of irrelevant matters during the early moments of a conversation so that, if the conversations are being monitored, agents, assuming the call to be innocent, will cease the interception." *United States* v. *James*, *supra*, 494 F. 2d at 1019. See also *United States* v. *Bynum*, *supra*, 485 F. 2d at 500-501. The minimization requirement of the statute is satis-

fied if "on the whole the agents have shown a high regard for the right of privacy and have done all they *reasonably* could to avoid unnecessary intrusion." *United States* v. *Tortorello*, *supra*, 480 F. 2d at 784 (emphasis added).

Viewing the minimization requirement in this context, it is significant that petitioners do not urge that their substantial rights were affected or that they were prejudiced in any way by the omission of the minimization provision from the initial warrant. As noted, the court of appeals found that the investigating agents were in fact aware of the requirement that they minimize the interception of innocent conversations (Cirillo Pet. App. 58–59), and the government established a "prima facie showing of compliance with the statutory minimization directive" (*id.* at 61–62). Furthermore, the warrant in question authorized the interception only of conversations to which Cirillo was a party over a particularly described telephone and which pertained to the illegal sales of narcotics, and only for a specified period of time (*id.* at 57–58, 87, 90). Such a limitation is an implicit directive to minimize the interception of innocent conversations. We agree with the court of appeals in "[r]ecognizing that [McKinney's CPL, *supra*, Sec. 700.30(7)] is essentially a summation of 'the more specific requirements of 700.30(1)–(6), all of which [lead] to minimization' * * *" (*id.* at 58). In light of substantial compliance with the statutory requirements for the contents of an electronic surveillance warrant, and because of *actual* compliance by the monitoring

agents with the statutory minimization requirement, the court of appeals correctly concluded that there was no basis for suppression of the evidence of which petitioners complain.

2. Petitioners argue that the trial court erred in denying their motion to suppress the evidence without first holding an evidentiary hearing to determine whether the investigative agents had executed the interceptions in such a manner as to minimize the interception of innocent conversations (Cirillo Pet. 34–40; Sorrentino Pet. 11–14). The trial court reviewed the monitoring agents' logs of the wire interceptions on Cirillo's and Sorrentino's telephones, as well as affidavits submitted by government officials involved in the investigation,[*] and denied petitioners' motion on the grounds that "[n]o material issue has been raised which requires a hearing * * *" (Cirillo Pet. App. 86). In a portion of its opinion upon which we rely, the court of appeals affirmed the judgment of the district court on this issue (Cirillo Pet. App. 60–62):

> The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed fur-

[*] The affidavits submitted were those of Assistant United States Attorney Heinemann, Assistant District Attorney Hershey, and Special Agent Dovetko. The affidavits filed by both prosecutors set forth their awareness of the minimization requirement and the steps taken to inform the investigative agents of this requirement (Cirillo Pet. App. 82–83). The affidavit of Agent Dovetko set forth the instructions he received from Heinemann as well as his personal knowledge of the investigative agents' efforts to minimize the interception of innocent conservations (*id.* at 61, 82–83).

ther that at all times the Cirillo and Sorrentino wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity." [Footnote omitted.] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the statutory minimization directive. See *United States* v. *Rizzo* [491 F. 2d 215, 217–218 (C.A. 2), certiorari denied, No. 6263, May 13, 1974]. Indeed, the prima facie showing is even stronger here than in *Rizzo,* which also upheld a wiretap conducted pursuant to the New York statute. There the state police detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve

> minimization. [Footnote omitted.] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.[9]

3. New York City Police Detective Garcia testified that, based upon his experience in narcotics investigations, some seemingly innocuous terms used by petitioners in their conversations were disguised references to narcotics. Petitioners argue that this testimony was improper because it invaded the fact-finding province of the jury (Sorrentino Pet. 14–16; Venetucci Pet. 19). The court below properly rejected this claim (Cirillo Pet. App. 62–63):

> Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references

[9] Petitioners Sorrentino and Cesare complain (Sorrentino Pet. 13–14) that neither the logs nor the tapes were made available until after argument on the minimization issue was heard on June 3, 1973. However, the record before this Court indicates that the tapes and logs were available to defense counsel prior to June 3 (Venetucci Pet. App. 45a). Furthermore, since defense counsel did not request additional time to analyze the tapes and logs, their argument that they did not have an opportunity to review those materials is not persuasive.

to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States* v. *Borrone-Iglar,* 468 F. 2d 419, 421 (2d Cir.), *cert. denied,* 410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

4. Petitioner Venetucci alleges that Assistant United States Attorney Heinemann told his counsel on May 17, 1973, that no conversation of Venetucci's had been intercepted, although Heinemann did not recall having made such a statement (Cirillo Pet. App. 63–64). Prior to trial, the government furnished defense counsel with approximately 90 transcripts of tape-recorded conversations that were deemed pertinent and that might be used at trial; Venetucci was a party to none of those conversations (*id.* at 64; Venetucci Pet. App. 37a). During the fifth day of trial, government counsel informed the court that recordings of two conversations between Venetucci and Sorrentino had been discovered while reviewing the logs of the Sorrentino interception the night before. Over defense counsel's objection, the tapes and transcripts of the two conversations were admitted in evidence (Cirillo Pet. App. 64).

Petitioner contends that he was denied an opportunity to participate in the pretrial suppression hear-

ings because of the government's late disclosure of the Venetucci conversations and was unduly prejudiced because his counsel represented to the jury in his opening statement that the government had failed to intercept any conversations between him and his co-defendants (Venetucci Pet. 12–16). The contentions were answered by the court below, upon whose opinion we rely (Cirillo Pet. App. 65-67):

> We agree with Venetucci that the government should have produced the transcripts of his conversations with Sorrentino prior to trial in response to his explicit discovery requests, see *United States* v. *Crisona*, 416 F. 2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations.
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> * * * * *
>
> Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity of the wiretap orders or on the conduct of the wiretap operation [footnote omitted] borders on the frivo-

lous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States* v. *Allsenberrie*, 424 F. 2d 1209, 1215 (7th Cir. 1970); *Pierce* v. *United States*, 414 F. 2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States* v. *Padrone*, 406 F. 2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Moreover, as the court of appeals noted, the government made the logs of the Cirillo and Sorrentino intercceptions available to defense counsel at least two and a half months before trial. On the third page of the Sorrentino logs, there was a log entry, highlighted by two asterisks, which read, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on * * *" (Cirillo Pet. App. 65). As the court stated, "All counsel were at all times aware that 'Bobby' and 'Brother' were the nicknames for Venetucci and Sorrentino, respectively" (*id.* at 66). Since this entry was as easily discoverable by Vene-

tucci's counsel as it was by the government, it is difficult to see how petitioner Venetucci was prejudiced by the failure of the Assistant United States Attorney to discover these conversations until after the trial had begun.

5. Petitioner Venetucci argues that the government's evidence showed two separate conspiracies, rather than one continuing conspiracy as charged in the indictment, since there is no evidence of his involvement in the March heroin transaction (Venetucci Pet. 18–19).

This has become a familiar claim in cases arising in the Second Circuit, particularly in situations involving large scale narcotics distribution. See, *e.g., United States* v. *Sperling, et al.*, C.A. 2, No. 73–2363, October 10, 1974; *United States* v. *Mallah, et al.*, C.A. 2, No. 74–1327, September 23, 1974; *United States* v. *Arroyo*, 494 F. 2d 1316 (C.A. 2), petitions for writs of certiorari pending, Nos. 73–1574, 73–6610, 73–6913; *United States* v. *Bynum, supra; United States* v. *Mapp*, 476 F. 2d 67 (C.A. 2). *See also United States* v. *Rizzo*, 491 F. 2d 1235 (C.A. 2); *United States* v. *DeMarco*, 488 F. 2d 828 (C.A. 2). That court has been most sensitive to the problem and to the importance of safeguarding the rights of the accused in such circumstances. See, *e.g., United States* v. *Sperling, supra*, slip op. at pp. 5664–5665; *United States* v. *Mallah, supra*, slip op. at pp. 5494–5502. At the same time, the court has recognized the practicalities of modern-day illicit drug trafficking, which so often is as intricate as a business enterprise of the corporate variety or even a "vertically inte-

grated loose-knit combination. * * * [E]ach level of the operation depends upon the existence of the other, and the mutual interdependence of each is fully understood and appreciated by the other." *United States* v. *Bynum, supra,* 485 F. 2d at 495. See *id.* at 495–497. As the court of appeals stated in the instant case (Cirillo Pet. App. 74–77):

> We are not here confronted, however, with merely a single delivery or purchase on the part of [petitioner], which, without more, might not support knowledge of a broader conspiracy * * * but with deeper involvement on the part of each of these participants. Venetucci met on at least two occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo,* 494 F.2d 1316, 1319 (2d Cir. 1974).

* * * * *

> Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting

from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States,* 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies * * * here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that '[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence * * * as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators.' In *Blumenthal* v. *United States,* 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a similar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.[10]

[10] Petitioner Venetucci's argument (Venetucci Pet. 20), that it was error to introduce in evidence the small amount of cocaine found in the possession of co-defendants Murphy and Cirillo at the time of their arrest along with the half kilogram of heroin, is without merit. As the court of appeals pointed out, evidence of the cocaine was relevant to refute the defendants' claim that the half kilogram of heroin had been planted on Cirillo by government agents (Cirillo Pet. App. 78). Venetucci's contention, raised only in his list of questions presented and not in argument (Venetucci Pet. 3), that the evidence against him was insufficient for submission to the jury and for conviction, is equally without merit and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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